DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Grant Appeals Board

Office of Hearings for Civil Money Penalties

In the Case of:	
The Inspector General,	DATE: Dec 22, 1986
- v. -	Docket No. C-15
Jimmy Paul Scott, Ph.D.,	DECISION CR 8
Respondent.	

DECISION AND ORDER

In this civil money penalties and assessments case, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) sent Jimmy Paul Scott, Ph.D. (Respondent) a Notice of Determination on March 1, 1985, alleging that the Respondent submitted false or improper Medicaid claims for payment in violation of the Civil Monetary Penalties Law (CMPL), 42 U.S.C.A. §1320a-7a (1983, 1985 Supp) and its implementing federal regulations (Regulations), 42 C.F.R. §§1003.100 to 1003.133 (1986). 1/ 2/ The Respondent challenged the I.G.'s allegations on May 16, 1986 by filing an answer and requesting a hearing.

1/ Sections 1128A and 1128(c) of the Social Security Act (Act) are the two sections that are referred to as the Civil Monetary Penalties Law (CMPL); these two sections are codified in sections 1320a-7a and 1320a-7(c) of Title 42, U.S.C. (1986). The CMPL was passed by Congress as part of section 2105 of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. No. 97-35, 95 Stat. 357, 789-92, enacted on August 13, 1981). The CMPL was amended by Congress in section 137(b)(26) of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. No. 97-248, 96 Stat. 380), and amended again on July 18, 1984 in Public Law 98-369 (98 Stat. 1073, 1089, 1100).

2/ The Regulations were approved on July 27, 1983, promulgated on August 26, 1983, and became effective on September 26, 1983. 48 Fed. Reg. 38827 et seq., (August 26, 1983). They were amended in 1985 to expand subpoena powers and to make technical corrections (50 Fed. Reg. 37371 et seq., September 13, 1985), amended again in May 1986 to add provisions to §101.102 (51 Fed Reg 18790 et. seq. May 22, 1986), and recodified in September 1986, from 45 C.F.R. (Part 101, §§101.100 to 101.133) to 42 C.F.R. (Ch. V, §§1003.100 to 1003.133) (51 Fed. Reg. 34764 et seq., September 30, 1986) (See also, 51 Fed. Reg. 37577 and 39528 for technical corrections). The 1986 recodification of the Regulations resulted in no substantive changes.

JURISDICTIONAL AND PROCEDURAL BACKGROUND

In her March 1, 1985 Notice of Determination, Eileen Boyd, the Deputy Assistant I.G., Civil Fraud Division, DHHS, notified the Respondent of the I.G.'s intent to impose civil money penalties and assessments against Respondent in the amount of $84,000 (penalties of $80,000 and assessments of $4,000); no suspension was proposed. The Notice of Determination was based on the I.G.'s conclusion that, during the period August 21, 1981 through June 18, 1982, the Respondent had presented or caused to be presented claims for Medicaid payment for 73 line items or services which the Respondent knew or had reason to know were not provided as claimed, in violation of the CMPL and Regulations.

In his May 16, 1985 challenge to the I.G.s notice, the Respondent demanded a hearing before an ALJ and attached an answer raising several defenses and an argument, in the alternative, that the penalties and assessments should be reduced because of mitigating circumstances (pursuant to section 1003.109(b)(2) of the Regulations).

A Prehearing Conference was held in San Francisco, California, at which time prehearing and hearing procedures, opportunities for discovery, and due process rights under the CMPL and Regulations were discussed, and a schedule was set forth regarding discovery, exchanges of documents, submission of prehearing motions, and preparation for the hearing. A Prehearing Order was issued on August 7, 1985, revised on September 6, 1985, and supplemented on October 10, 1985. A Ruling was issued on November 22, 1985 in response to prehearing motions and evidentiary objections. Summaries of telephone conferences which confirmed Rulings were issued on April 29, May 1, August 27, and September 2, 1986.

A formal hearing was held in San Francisco, California, from December 10 to December 12, 1985, and from May 5 to May 9, 1986, at which time the parties were afforded a full opportunity to present and have relevant evidence entered into the record, to present and cross-examine witnesses, and to present statements, motions and argument, as provided by the CMPL and Regulations. The parties were represented by counsel at the hearing and were given the opportunity to submit post-hearing written briefs and proposed findings of facts and conclusions of law. The I.G. and the Respondent presented post-hearing briefs, proposed findings of fact and conclusions of law, and a reply brief.

THE GOVERNING LAW AND REGULATIONS

I. The Civil Monetary Penalties Law (CMPL) and Regulations

The first section of the CMPL (i.e., Title 42 U.S.C., §1320a-7a; §1128A of the Act) grants authority for the I.G. to issue a Notice of Determination to impose civil money penalties and assessments against any person who the I.G. determines has presented or caused to be presented any false or improper claims for payment under the Medicare, Medicaid, or the Maternal and Child Health Services Block Grant programs. The second section of the CMPL (i.e., 42 U.S.C. §13207a-7(c); §1128(c) of the Act) grants authority for the I.G. to include a proposal to suspend such a person from participation in the Medicare and Medicaid programs. 3/4/5/6/ In this case, only §1320a-7a is of concern because no suspension was proposed.

The CMPL, its legislative history, and the Regulations make it clear that the intended purpose of imposing civil money penalties is to deter persons from presenting false or improper Medicare or Medicaid claims and the purpose of imposing assessments is to make the government whole for its damages and costs as a result of presenting such false or improper claims.

The Regulations implement the provisions of the CMPL, delegate authority from the Secretary to the I.G. to make determinations regarding false or improper claims presented, and provide a respondent the right to a hearing before a federal administrative law judge (ALJ). The I.G. has the burden of proof regarding liability and aggravating circumstances; a respondent has the burden of proof regarding circumstances that would justify reducing the amount of the penalty, or assessment. Regulations §1003.114. Either

---

3/ The terms "civil monetary penalties" and "civil money penalties" are used interchangeably in the CMPL, the Regulations, and this Decision and Order.

4/ Section 1320a-7a(h)(2) of the CMPL and §1003.101 of the Regulations define a "claim" as an application for payment submitted for one or more items or services for which payment may be made under the Medicare (Title XVIII), Medicaid (Title XIX), or Maternal and Child Health Services Block Grant (Title V) programs.

5/ Section 1320a-7a(a)(1)(A) of the CMPL and §1003.102 of the Regulations define a false or improperly presented claim to be one containing one or more items or services that "the person knew or had reason to know was not provided as claimed."

6/ Section 1320a-7a(h)(3) of the CMPL and §1003.101 of the Regulations define an "item or service" to include any item, device, medical supply or service claimed to have been provided to a patient and listed in an itemized claim for payment.

party may seek review by the Secretary of DHHS of an ALJ's decision and order and may seek judicial review of any decision and order that has become final. Regulations §§1003.125, 1003.127.

All of the claims in this case were presented and received on or after August 13, 1981. To establish liability for claims presented on or after August 13, 1981 (the effective date of the CMPL), the I.G. must prove by a preponderance of the evidence all the requisite elements of liability set forth in the CMPL and Regulations. See CMPL §1320a-7a(1)(A); Regulations §1003.102(a)(1), 1003.114(a). For ease of discussion, I separated those elements into seven parts, as follows: (1) that a "person" (2) "presented or caused to be presented" (3) one or more Medicaid (or Medicare) "claims" (4) containing one or more medical "items or services" (5) to the Medicaid (or Medicare) "agency" for payment (6) that a respondent "knew or had reason to know" (7) were "not provided as claimed". 7/ Regulations §§1003.101, 1003.102. The I.G. also must prove by a preponderance of the evidence any alleged aggravating circumstances. Regulations §§1003.114, 1003.106. Section 1003.106 of the Regulations sets forth guidelines for determining both aggravating and mitigating circumstances. Section 1003.114(d) of the Regulations sets forth the standard of proof for mitigating circumstances:

> The respondent shall bear the burden of producing and proving by a preponderance of the evidence any circumstances . . . that would justify reducing the amount of the penalty or assessment. . . .

The Regulations provide that the maximum penalty is $2,000 for each false or improper item or service listed on each claim in issue (Regulations, §1003.103); the maximum assessment is twice the amount of items or services falsely or improperly claimed. Regulations, §1003.104.

The Regulations require that a full and fair "trial-type hearing" be conducted by an ALJ. See, Regulations §1003.111 (right to a hearing), 1003.113 (notice of hearing), 1003.114 (burden of proof), 1003.115 (right to a fair hearing to be conducted by an ALJ), 1003.116 (rights of parties), 1003.117 (discovery rights), 1003.118 (evidence and witnesses), 1003.120 (no ex parte contacts), 1003.123 (briefs and proposed findings of fact and conclusions of law), 1003.124 (record), 1003.125 (decision and order), 1003.126 (judicial review), and 1003.132 (limitations); see also, Londoner v. Denver, 210 U.S. 373, 386 (1908); DAVIS, Administrative Law Treatise, 2d Ed. 1978, chapters 12, 13. In addition, the parties have the right to cross-examine all witnesses called by the opposing party well beyond the normal scope of cross-examination. Regulations, §1003.118(d).

7/ The CMPL and Regulations also set forth other bases for liability which are not relevant in this case. See Regulations §101.102(a)(2) and (b).

II. The Medicaid Law and Program in California (Medi-Cal)

Title XIX of the Act (42 U.S.C. §1396 et seq.) establishes a program, known as Medicaid, under which the federal government provides financial assistance to participating states to aid them in furnishing health care to needy persons. See, Harris v. McRae, 488 U.S. 297, (1980). If a state chooses to have a Medicaid program, it must submit a "State Plan" to the Secretary of DHHS which meets federal statutory and regulatory requirements for federal approval. The approved California Medicaid program is known as "Medi-Cal". Medi-Cal is responsible for determining eligibility for services, establishing standards for the services provided, establishing standards and requirements for the submission of claims for reimbursement, setting payment levels for providers of services, processing claims, and paying claims. These standards and requirements are set forth as provisions of law in the California Administrative Code (CAC), Title 22. See also, Cal. Welf. & Inst. Code §14063.

Computer Sciences Corporation (CSC) serves as the fiscal intermediary (also referred to as fiscal agent, or carrier) for the Medi-Cal program and, as such, facilitates the processing and payment of claims for reimbursement. TR I/67, 69; I.G. Ex 44. CSC processed and paid claims submitted by Medi-Cal providers for items or services that the providers stated were rendered to Medicaid beneficiaries during the relevant time period in this case. Id.

ISSUES

The principal issues are:

A) Liability:

1) Whether the I.G. proved by a preponderance of the evidence that the Respondent "presented or caused to be presented," from August 12, 1981 through June 28, 1982, Medicaid "claims" for payment for 73 reimbursable medical "services" that the Respondent "knew or had reason to know" were "not provided as claimed."

B) The Amount of Penalties and Assessments if Liability is Proven:

2) Whether the I.G. proved by a preponderance of the evidence that aggravating circumstances exist in this case.

3) Whether the Respondent proved by a preponderance of the evidence any circumstances that would justify reducing the amount of the penalties or assessments proposed (mitigating circumstances).

4) Whether the amount of the proposed penalties and assessments is reasonable and appropriate under the circumstances of this case, within the intent and meaning of the CMPL and Regulations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments, objections, motions, and submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law: 8/ 9/ 10/

1. For the purposes of this case, I have taken judicial notice of the statutes of the United States, the regulations of the Secretary of DHHS, all other pertinent regulations of the United States, the statutes of the State of California, the regulations of the California Medicaid Program and all other pertinent regulations of the State of California as they existed during the time at issue in this case.

2. This proceeding is governed by the CMPL and the Regulations.

8/ References to the briefs, the transcript, the stipulations, hearing exhibits, and to the "Findings of Fact and Conclusion of Law" are as follows:

I.G.'s Brief	=	I.G. Br/page number
I.G.'s Reply Brief	=	I.G. Rep Br/page number
Respondent's Brief	=	R Br/page number
Respondent's Reply Brief	=	R Rep Br/page number
Transcript	=	TR/volume/page number
Written Stipulations	=	Stip. (number)
I.G. Exhibit	=	I.G. Ex/page number
Respondent's Exhibit	=	R Ex/page number
ALJ Findings of Fact and Conclusions of Law	=	FFCL/number

9/ Some of the findings and conclusions proposed by the parties were rejected or modified because they were not supported by the evidence in the record and some have been incorporated elsewhere in this Decision.

10/ Any part of this Decision and Order preceding the Findings of Fact and Conclusions of Law which is obviously a finding of fact or conclusion of law is hereby incorporated as a finding of fact or conclusion of law; I refer primarily to the facts and conclusions that were not disputed or which are clear and do not need to be repeated here.

3. The Secretary has delegated his authority to take action under the CMPL and the Regulations to the I.G. and to the I.G.'s delegates.

4. The authorized Notice or Determination dated March 1, 1985, notified the Respondent that the I.G. had determined that the Respondent should be subject to penalties of $80,000 and assessments of $4,000, alleging that the Respondent presented or caused to be presented to CSC, from August 21, 1981 through June 18, 1982, false or improperly filed claims for Medicaid payment involving 73 line items or services which the Respondent knew or had reason to know were not provided as claimed, in violation of the CMPL and Regulations. A true and correct copy of this Notice and its attachment is a part of the record in this case.

5. The Respondent, Jimmy Paul Scott, Ph.D. (a person within the meaning of the CMPL and Regulations) by letter dated May 16, 1985, filed an answer to the Notice, and a request for a hearing before an ALJ, pursuant to section 1003.109(b)(2) of the Regulations. A true and correct copy of this answer and the defenses listed therein is a part of the record in this case. Regulations, §1003.101.

6. Medi-Cal is the California Medicaid program under Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq.; Cal. Welf. and Inst. Code §14063.

7. The fiscal intermediary for the Medi-Cal program during the period covered by the claims in issue was CSC. TR I/67, 69; I.G. Ex 44/3.

8. Under the Medi-Cal program, psychotherapy is a covered service when provided by a licensed psychologist. Calif. Admin. Code title 22 (CAC) §§51309(a); 51232.

9. No more than two psychology services per month are covered by Medi-Cal. Id. §51304.

10. Medi-Cal beneficiaries are issued Medi-Cal cards each month, TR II/256, containing two "MEDI" stickers. TR III/137-139.

11. A claim for reimbursement for psychology services must have a MEDI sticker affixed to the claim form before Medi-Cal will pay the claim. TR II/261; I.G. Ex 38.

12. The Medi-Cal program covers individual psychotherapy (one-half hour, one hour or one and one-half hours). CAC §51505.3; I.G. Ex 38.

13. The procedure code for one-half hour of psychotherapy is 2360; for one hour, 2361; and for one and one-half hours, 2362. If a code 2362 is claimed, the provider must attach a justification. Id.; TR IV/31.

14. The Provider Manual issued by CSC provides instructions to program participants and contains the law concerning Medi-Cal reimbursement. Appendix A of the Manual relates to psychology, and makes clear that (1) psychology services are limited to two a month and (2) for each separate therapy service, there must be a MEDI sticker that is valid for the month of the service. I.G. Ex 38/A-23.

15. The Medi-Cal program does not pay for vitamins or nutritional supplements. CAC §§51313, 59999.

16. The Medi-Cal regulations make it illegal for a provider to remove more stickers from a Medi-Cal card than are necessary for a particular service and illegal to use stickers issued to anyone other than the patient. CAC §51486.

17. Dr. Scott was, during the relevant period, licensed in California as a psychologist by the Bureau of Medical Quality Assurance (BMQA). TR IV/32; I.G. Ex 44/2.

18. Dr. Scott was not licensed as a physician. TR IV/33.

19. Dr. Scott participated in the Medi-Cal program. I.G. Ex 45/3.

20. Gail Hartman began working for Dr. Scott around July 1981. She did the billing for him, in accordance with his instructions. I.G. Ex 45, 46.

21. The billing account records kept by Dr. Scott contained ledger cards and copies of receipts. See, I.G. Ex 6A-31.

22. Dr. Scott also kept client (patient) files containing notes and office visit vouchers or receipts. I.G. Ex 6A-31; I.G. Ex 45.

23. The entries in the client files, the entries in the ledger cards, and the receipts are all consistent with each other. In other words, the entries in the client files match the entries in the ledger cards, and the ledger cards match the receipts in the files. TR IV/44, 53-54, 69-71. (Also, the "OV" (office visit) and "supp" (nutritional supplements) receipts match corresponding entries in the leder cards.) E.g., TR III/350-353; TR IV/39, 44-45.

24. Dr. Scott and Gail Hartman kept appointment books. Office visits and other appointments were entered in those books. TR IV/91-95; I.G. Ex 35, 36, 46.

25. Dr. Scott reviewed and signed the Medi-Cal claims, which had been prepared by Gail Hartman in accordance with Dr. Scott's instructions. I.G. Ex 45, 46.

26. Both Dr. Scott and Gail Hartman knew the relevant billing rules for psychotherapy services. They both were familiar with procedure codes 2361 and 2362. They were familiar with the limitations on the use of MEDI stickers (and the rule that only MEDI stickers could be used on Respondent's claims). I.G. Ex 45, 46; TR III/317; TR VI/133.

27. Dr. Scott knew that the Medi-Cal program would not pay him for vitamins or nutritional supplements sold to clients. TR III/334. TR VII/141, 144; I.G. Ex 45.

28. Gail Hartman also knew that MEDI sticker were to be used solely for psychotherapy and not for nutritional and other services. I.G. Ex 46; TR III/312.

29. All of the claims in this case list the same diagnosis description -- stress reaction. I.G. Ex 1A, 1B; TR V/5. See also, I.G. Ex 46; I.G. Ex 37.

30. Dr. Scott told clients that MEDI stickers could be used in payment for the vitamins he sold. TR VI/142; TR III/338.

31. The claims at issue here are for a "medical or other item or service;" the claims were for "psychotherapy." CMPL, §1320a-7a(h)(3).

32. Dr. Scott "presented or caused to be presented" the 73 claims at issue here. He admitted in his interview with investigators of the Bureau of Medi-Cal Fraud that he signed the claims that were filed with CSC for Medi-Cal reimbursement. I.G. Ex 45; Regulations §1003.102.

33. Dr. Scott sold vitamins to his clients. 11/ TR III/296, 338, TR VI/142; TR VII/114, 116; I.G. Ex 6B-31.

11/ The use of the term "vitamins" in this Decision includes vitamin and nutritional supplements as well.

34. Dr. Scott and Gail Hartman told clients that a single MEDI sticker could be applied as a credit of as much as $20.00 against vitamin purchases, and they so credited clients for vitamin purchases. TR II/268; TR III/300; I.G. Ex 44 at 1; TR VII/114, 116, 124, 126; I.G. Ex 6A-31.

35. Billing records, client files ,and other documents relied on by the I.G. in this case were obtained by a search warrant served by investigators during the development of the State case against Dr. Scott. The search warrant was for specified records and documents relating to the period August 4, 1981 through April 6, 1982, and State publications containing information about the Medi-Cal program. I.G. Ex 4A. Attached to the warrant was a group of forms containing information about Medi-Cal claims submitted by Dr. Scott during the relevant period. The information included the names of clients and the service provided. I.G. Ex 4C.

36. Agents of the California Attorney General's Medi-Cal Fraud unit went to Dr. Scott's office on June 10, 1982, advised him of his Miranda rights, and served the search warrant on Dr. Scott.12/ TR II/216; I.G. Ex 45. The agents executed the search warrant by looking through the medical and billing files and taking those for the period August 4, 1981 through April 6, 1982, which appeared, in the judgment of the agents, to be useful. TR II/203. Mario Piazza, an investigator for the Medi-Cal Fraud unit, testified that the agents did not take all of the records and files for the period because they were too voluminous. TR II/203.

37. On the same day, June 10, 1982, the agents prepared a list of the property taken from Dr. Scott's office. On September 28, 1982, agent Mario Piazza amended the list to add the name of one person inadvertently omitted earlier from the list. I.G. Ex 5.

38. Evelynne Mills was never a client of Dr. Scott and did not have an appointment with him on any of the dates claimed. I.G. Ex 47; TR IV/80-81; I.G. Ex 35.

39. Dr. Scott certified on a Medi-Cal claim dated September 21, 1981 that he provided psychotherapy services to Evelynne Mills on May 5 and 26, June 2 and 23, July 16 and 30, August 4 and 18, and September 7 and 21, 1981. I.G. Ex 1B.

12/ Pursuant to the decision in Miranda v. Arizona, 384 U.S. 436 (1966), an accused must be advised, before any statement is taken, of his right to remain silent and of the possible consequences of giving a voluntary statement.

40. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Evelynne Mills on May 5 and 26, June 2 and 23, July 16 and 30, August 4 and 18, and September 7 and 21, 1981, as claimed. I.G. Ex 1B, 2, 3, 6A.

41. Clubert Kregel did not have an appointment with Dr. Scott and did not have an office visit with him on November 2 and 16 and December 4 and 18, 1981, as claimed. I.G. Ex 6B, 35; TR IV/97, 99.

42. Clubert Kregel purchased vitamins from Dr. Scott's office but did not have an office visit with Dr. Scott on November 10, 1981. She paid for the vitamins with MEDI stickers. I.G. Ex 6B; TR IV/98.

43. Dr. Scott certified on November 19, 1981 that he provided psychotherapy services to Clubert Kregal on November 2 and 16, 1981; he certified on December 18, 1981 that he provided psychotherapy services to Clubert Kregal on December 4 and 18, 1981. I.G. Ex 1B.

44. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Clubert Kregel on November 2 and 16, 1981, and December 4 and 18, 1981, as claimed. I.G. Ex 1B, 2, 3.

45. James Murphy did not have either an appointment or an office visit with Dr. Scott on July 6 and 29, August 11 and 26, and September 3 and 17, 1981, as claimed. I.G. Ex 35; TR IV/124, 129, 140.

46. Dr. Scott certified on August 27, 1981 that he provided psychotherapy services to James Murphy on August 11 and 26, 1981; he certified on October 22, 1981, that he provided psychotherapy services to James Murphy on July 6 and 29 and September 3 and 17, 1981. I.G. Ex 1B.

47. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to James Murphy on July 6 and 29, August 11 and 26, and September 3 and 17, 1981, as claimed. I.G. Ex 1B, 2, 3.

48. Donald Wilkins was never a client of Dr. Scott and did not have an appointment with him on any of the dates claimed. I.G. Ex 35; TR IV/140, 142.

49. Dr. Scott certified on August 21, 1981, that he provided psychotherapy services to Donald Wilkins on August 7 and 21, 1981; Dr. Scott certified on October 22, 1981 that he

provided psychotherapy services to Donald Wilkins on September 16 and 29 and October 2 and 16, 1981; Dr. Scott certified on December 8, 1981 that he provided psychotherapy services to Donald Wilkins on November 6 and 20, Dr. Scott certified on December 24, 1981 that he provided psychotherapy services to Donald Wilkins on December 7 and 21, 1981; Dr. Scott certified on January 21, 1982 that he provided psychotherapy services to Donald Wilkins on January 6 and 20, 1982. I.G. Ex 1B.

50. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Donald Wilkins on August 7 and 21, September 16 and 29, October 2 and 16, November 6 and 20, and December 7 and 21, 1981; and January 6 and 20, 1982, as claimed. I.G. Ex 1B, 2, 3.

51. Rhoda Sachs did not have either an appointment or an office visit with Dr. Scott on September 4 and 18, October 9 and 30, November 11 and 25, and December 7 and 21, 1981; and January 5 and 20, 1982, as claimed. I.G. Ex 9, 35, 36.

52. Rhoda Sachs purchased vitamins from Dr. Scott's office but did not have an office visit with him on September 15 and December 29, 1981. She paid for the vitamins with MEDI stickers. I.G. Ex 9.

53. Dr. Scott certified on September 18, 1981, that he provided psychotherapy services to Rhoda Sachs on September 4 and 18, 1981; he certified on December 30, 1981, that he provided psychotherapy services to Rhoda Sachs on October 9 and 30, November 12 and 25, and December 7 and 21, 1981; he certified on January 21, 1982, that he provided psychotherapy services to Rhoda Sachs on January 5 and 20, 1982. I.G. Ex 1B.

54. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Rhoda Sachs on September 4 and 18, October 9 and 30, November 12 and 25, and December 7 and 21; and January 5 and 20, 1982, as claimed. I.G. Ex 1B, 2, 3.

55. Cecilia Najera did not have either an appointment or an office visit with Dr. Scott December 24, 1981, as claimed. I.G. Ex 10A, 10B, 35.

56. Cecilia Najera had an office visit with Dr. Scott on December 8, 1981, and purchased vitamins from him on that date. She paid for the office visit and the vitamins with MEDI stickers. I.G. Ex 10A.

57. Cecilia Najera purchased vitamins from Dr. Scott's office but did not have an office visit with him on December 17, 1981. She paid for the vitamins with MEDI stickers. I.G. Ex 10A, 10B, 35.

58. Dr. Scott certified on December 24, 1981, that he provided psychotherapy services to Cecilia Najera on December 9 and 24, 1981. I.G. Ex 1B.

59. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Cecilia Najera on December 24, 1981, as claimed. I.G. Ex 1B, 2, 3.

60. Michelle Najera did not have either an appointment or an office visit with Dr. Scott on May 28, 1982, as claimed. I.G. Ex 10A, 10B, 35, 36; TR IV/145.

61. Michelle Najera is Cecilia Najera's daughter. On June 1, 1982, Cecilia Najera purchased vitamins from Dr. Scott and gave him 11 MEDI stickers toward the purchase of the vitamins. TR IV/145; I.G. Ex 1B, 10A.

62. Dr. Scott certified on June 3, 1982, that he provided psychotherapy services to Michelle Najera on May 28, 1982. I.G. Ex 1B.

63. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Michelle Najera on May 28, 1982, as claimed. I.G. Ex 1B, 2, 3.

64. Nikki Najera was never a client of Dr. Scott and did not have an appointment with him on May 28, 1982, as claimed. I.G. Ex 10A, 10B, 35, 36; TR IV/145.

65. Nikki Najera is Cecilia Najera's daughter. I.G. Ex 10A; TR IV/145. On June 1, 1982, Cecilia Najera purchased vitamins from Dr. Scott and gave him 11 MEDI stickers toward the purchase of the vitamins.

66. Dr. Scott certified on June 3, 1982, that he provided psychotherapy services to Nikki Najera on May 28, 1982. I.G. Ex 1B.

67. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Nikki Najera on May 28, 1982, as claimed. I.G. Ex 1B, 2, 3.

68. Julienne Malecot did not have either an appointment or an office visit with Dr. Scott on May 27, 1982, as claimed. I.G. Ex 17A, 17B, 35, 36.

69. Julienne Malecot is the daughter of Madeline Gunter and the granddaughter of Rhoda Sachs. Madeline Gunter gave Dr. Scott MEDI stickers assigned to Julienne Malecot in exchange for vitamins. TR V/6-7; I.G. Ex 17A.

70. Dr. Scott certified on May 27, 1982, that he provided psychotherapy services to Julienne Malecot on May 27, 1982.

71. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Julienne Malecot on 27, 1982, as claimed. I.G. Ex 1B, 2, 3.

72. Deborah Webb did not have either an appointment or an office visit with Dr. Scott and did not have an office visit with him on December 28, 1981, as claimed. I.G. Ex 11, 35, 36.

73. Dr. Scott's office received ten (10) MEDI stickers from Deborah Webb on January 26, 1982. These stickers and others from her child, Owyhee, were used to retire a debit balance resulting from the purchase of vitamins and a personal loan from Dr. Scott. I.G. Ex 11.

74. Dr. Scott certified on January 28, 1982, that he provided psychotherapy services to Deborah Webb on December 28, 1981. I.G. Ex 1B.

75. Dr. Scott "knew or had reason" to know that he had not provided psychotherapy services to Deborah Webb on December 28, 1981, as claimed. I.G. Ex 1B, 2, 3.

76. Rue Burlingham did not have either an appointment or an office visit with Dr. Scott on December 29, 1981, as claimed. I.G. Ex 12, 35, 36.

77. Rue Burlingham had an office visit with Dr. Scott on January 8, 1982, at which time she gave him her two MEDI stickers for December 1981. Ms. Burlingham had an office visit with Dr. Scott on January 11, 1982, at which time she gave him her two MEDI stickers for January 1982. She paid for vitamins she purchased from Dr. Scott on January 11 with the MEDI stickers. I.G. Ex 12.

78. Dr. Scott certified on January 14, 1982 that he provided psychotherapy services to Rue Burlingham on December 29, 1981. I.G. Ex 1B.

79. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Rue Burlingham on December 29, 1981, as claimed. I.G. Ex 1B, 2, 3.

80. Barbara Stotts did not have either an appointment or an office visit with Dr. Scott December 30, 1981, as claimed. I.G. Ex 13A, 13B, 35, 36.

81. Barbara Stotts is the mother of Hadley Stotts. I.G. Ex 1B, 13A; TR IV/156-158.

82. Barbara Stotts purchased vitamins from Dr. Scott's office on December 24, 1981, but did not have an appointment or an office visit with him on that date. She gave Dr. Scott 14 MEDI stickers, including two of Hadley's, and purchased vitamins from Dr. Scott with the stickers. I.G. Ex 13A, 35, 36; TR IV/156-158.

83. Dr. Scott certified on December 30, 1981, that he provided psychotherapy services to Barbara Stotts on December 30, 1981. I.G. Ex 1B.

84. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Barbara Stotts on December 30, 1981, as claimed. I.G. Ex 1B, 2, 3.

85. Hadley Stotts was never a client of Dr. Scott and did not have an appointment with him on May 27, 1982; as claimed. I.G. Ex 13A, 13B, 35, 36.

86. Dr. Scott certified on June 3, 1982, that he provided psychotherapy services to Hadley Stotts on May 27, 1982. I.G. Ex 1B.

87. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Hadley Stotts on May 27, 1982, as claimed. I.G. Ex 1B, 2, 3.

88. Sharone Negev did not have either an appointment or an office visit with Dr. Scott December 30, 1981, as claimed. I.G. Ex 14A, 14B, 35, 36.

89. Sharone Negev had office visits with Dr. Scott on December 16, 1981, and January 20 and February 16, 1982. On January 20, she gave Dr. Scott three MEDI stickers (one from December and two from January); on February 16, she gave him two MEDI stickers (from February). She paid for the office visits and purchased vitamins with the MEDI stickers. I.G. Ex 14A, 14B.

90. Dr. Scott certified on January 20, 1982, that he provided psychotherapy services to Sharone Negev on December 30, 1981. I.G. Ex 1B.

91. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Sharone Negev on December 30, 1981, as claimed. I.G. Ex 1B, 2, 3.

92. Daryl Goldman did not have either an appointment or an office visit with Dr. Scott on December 31, 1981, as claimed. I.G. Ex 15, 35, 36.

93. Dr. Scott's office received six MEDI stickers from Daryl Goldman on January 19, 1982 -- two from November, two from December, and two from January. I.G. Ex 15.

94. Dr. Scott certified on January 21, 1982, that he had provided psychotherapy services to Daryl Goldman on December 31, 1981. I.G. Ex 1B.

95. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Daryl Goldman on December 31, 1981, as claimed. I.G. Ex 1B, 2, 3.

96. Christina Cannon did not have either an appointment or an office visit with Dr. Scott and did not have an office visit with him on December 31, 1981, as claimed. I.G. Ex 16, 35, 36.

97. Dr. Scott's office sold Christina Cannon vitamins on December 9, 1981, charging her $30.74 plus $2.30 postage. Dr. Scott's office received two (December) MEDI stickers enclosed in a letter from Christina Cannon on January 9, 1982; in that letter she also ordered more vitamins. Dr. Scott's office charged her $45.58 plus $1.41 postage for these vitamins; she paid with MEDI stickers. I.G. Ex 16.

98. Dr. Scott certified on January 21, 1982, that he provided psychotherapy services to Christina Cannon on December 31, 1981. I.G. Ex 1B.

99. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Christina Cannon on December 31, 1981, as claimed. I.G. Ex 1B, 2, 3.

100. Sidney Tanaban did not have either an appointment or an office visit with Dr. Scott on May 26, 1982, as claimed. I.G. Ex 18A, 18B, 35, 36.

101. Sidney Tanaban had an office visit and purchased vitamins from Dr. Scott on May 11, 1982. Mr. Tanaban paid for the offic visit and the vitamins with MEDI stickers. I.G. Ex 18A.

102. Dr. Scott certified on May 27, 1982, that he provided psychotherapy services to Sidney Tanaban on May 5 and 26, 1982. I.G. Ex 1B.

103. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Sidney Tanaban on May 26, 1982, as claimed; Dr. Scott was reimbursed by Medi-Cal for these claimed services. I.G. Ex 1B, 2, 3.

104. Akune Tanaban was never a client of Dr. Scott and did not have an appointment with him on May 24, 1982, as claimed. I.G. Ex 18A, 18B, 35, 36.

105. Sidney Tanaban is Akune Tanaban's father. I.G. Ex 18A, 1B; TR IV/157-158.

106. Dr. Scott certified on May 27, 1982, that he provided psychotherapy services to Akune Tanaban on May 24, 1982. I.G. Ex 1B.

107. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Akune Tanaban on May 24, 1982, as claimed. I.G. Ex 1B, 2, 3.

108. Reginald Tanaban was never a client of Dr. Scott and did not have an appointment with him on May 24, 1982, as claimed. I.G. Ex 18A, 18B, 35, 36.

109. Sidney Tanaban is Reginald Tanaban's father. I.G. Ex 18A, 1B; TR IV/157-158.

110. Dr. Scott certified on May 27, 1982, that he provided psychotherapy services to Reginald Tanaban on May 24, 1982. I.G. Ex 1B.

111. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Reginald Tanaban on May 24 1982, as claimed. I.G. Ex 1B, 2, 3.

112. Esther Campos did not have either an appointment or an office visit with Dr. Scott on May 26, 1982, as claimed. I.G. Ex 19A, 19B, 35, 36; TR VII/121-134, 141-146.

113. Esther Campos purchased vitamins from Dr. Scott but did not have an office visit with him on May 6, 18, and 27, 1982. She gave Dr. Scott two (May) MEDI stickers on May 18, 1982, and he gave her a $40.00 credit toward the purchase of the vitamins. I.G. Ex 19A.

114. Dr. Scott certified on May 27, 1982, that he provided psychotherapy services to Esther Campos on May 26, 1982. I.G. Ex 1B.

115. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Esther Campos on May 26, 1982, as claimed I.G. Ex 1B, 2, 3.

116. Joti Frank did not have an appointment with Dr. Scott and did not have an office visit with him on May 26, 1982, as claimed. I.G. Ex 20A, 20B, 35, 36.

117. Joti Frank purchased vitamins from Dr. Scott but did not have an office visit with him on May 13, 1982. At that time she gave him two (May) MEDI stickers and gave her a credit of $40.00 toward the purchase of the vitamins. I.G. Ex 20A.

118. Dr. Scott certified on May 27, 1982, that he provided psychotherapy services to Joti Frank on May 26, 1982. I.G. Ex 1B.

119. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Joti Frank on May 26, 1982, as claimed. I.G. Ex 1B, 2, 3.

120. Roberta Nasser did not have either an appointment or an office visit with Dr. Scott on May 27, 1982, as claimed. I.G. Ex 21, 35, 36.

121. Roberta Nasser had an office visit and purchased vitamins from Dr. Scott on May 6, 1982. Ms. Nasser gave Dr. Scott two (May) MEDI stickers. Dr. Scott credited her approximately $40.00 for the two MEDI stickers toward the purchase of the vitamins. I.G. Ex 21.

122. Dr. Scott certified on May 27, 1982, that he provided psychotherapy services to Roberta Nasser on May 13 and 27, 1982. I.G. Ex 1B.

123. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Roberta Nasser on May 27, 1982, as claimed. I.G. Ex 1B, 2, 3.

124. Patricia Pennington did not have either an appointment or an office visit with Dr. Scott on May 28, 1982, as claimed. I.G. Ex 22, 35, 36.

125. Dr. Scott's office received two (May) MEDI stickers from Patricia Pennington on June 1, 1982. On that date the debit balance in her account with Dr. Scott was reduced by $40.00. I.G. Ex 22.

126. Dr. Scott certified on June 3, 1982, that he provided psychotherapy services to Patricia Pennington on May 28, 1982. I.G. Ex 1B.

127. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Patricia Pennington on May 28, 1982, as claimed; he was reimbursed by Medi-Cal for these claimed services. I.G. Ex 1B, 2, 3.

128. Luigi Barzini (an alias used by Bureau of Medi-Cal Fraud investigator Mario Piazza) did not have either an appointment or an office visit with Dr. Scott on December 11 and 22, 1981; and January 13 and 28, 1982, as claimed. I.G. Ex 8A, 8B, 35, 36; TR III/33.

129. Luigi Barzini's office visit with Dr. Scott on February 17, 1982, lasted only one-half hour and not one hour, as claimed. At the time of the visit Mr. Barzini obtained an order of vitamins. Mr. Barzini gave Dr. Scott a MEDI sticker to pay for the visit and part of the vitamin purchase. I.G. Ex 8A, TR III/338.

130. Dr. Scott certified on December 23, 1981 that he provided psychotherapy services to Luigi Barzini on December 11 and 22, 1981; Dr. Scott certified on January 28, 1982, that he provided psychotherapy services to Luigi Barzini on January 13 and 28, 1982; Dr. Scott certified on February 18, 1982, that he provided psychotherapy services to Luigi Barzini on February 2 and 17, 1982. I.G. Ex 1B.

137. At the office visit on January 28, 1982, Dr. Scott instructed Danny Brock to lie face up on a table and hold his arms outward at an angle. Dr. Scott then applied pressure to Mr. Brock's arms and legs in order to ascertain by the amount of resistance whether the energy flow was good or bad. Dr. Scott then told Mr. Brock to close his eyes (which he did only partially) while Dr. Scott put a finger near the top of Mr. Brock's head, and then Dr. Scott put his fingers on the sides of Mr. Brock's head. Each time, Dr. Scott stared into space for about a minute. Dr. Scott then repeated the arm and leg resistance tests described above. Dr. Scott told Mr. Brock that Dr. Scott had increased the energy flow in Mr. Brock's body and that Mr. Brock was a lot stronger. Dr. Scott also tested Mr. Brock for food allergies by placing food samples on Mr. Brock's stomach while Mr. Brock lay on his back and raised his arms and legs. Dr. Scott would, meanwhile, push down on the raised arm or leg and by the amount of resistance determine whether the food was good or bad for Mr. Brock. TR VI/134-138, 142.

138. The I.G. did not prove by a preponderance of the evidence that Dr. Scott "knew or had reason to know" that the services he provided to Danny Brock on January 28, 1982, were not "psychotherapy" services, as claimed. TR VI/121-122; FFCL 140-142, infra.

139. Dr. Scott knew or had reason to know that he had not provided psychotherapy services to Danny Brock on December 2 and 30, 1981, January 14 and February 4 and 18, 1982, as claimed. I.G. Ex 1B, 2, 3.

140. The I.G. advanced a definition of "psychotherapy" as practiced in California to mean the use of psychological methods to assist a person to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive. I.G. Br/32.

141. Jack Blumenkrantz, Ph.D, a psychologist whom the I.G. called to testify as an expert witness, said that in his opinion the services rendered by Dr. Scott to Mr. Piazza and Mr. Beall were not psychotherapy because psychologists do not use kinesiology (laying on of hands), nutritional counseling (including the application of vitamins), or the treatment of allergies as techniques. Later, during cross-examination, Dr. Blumenkrantz admitted that some respected psychologists disagreed with his views on the use of nutritional counseling. He also admitted that a psychologist takes into account all

131. Luigi Barzini had an office visit with Dr. Scott on February 2, 1982. Dr. Scott massaged Mr. Barzini's chest, back, thighs and legs, put objects (such as cigarettes, vodka, and coffee beans) on Mr. Barzini's chest (while Mr. Barzini was lying down) and had Mr. Barzini raise his arm while Dr. Scott pushed on it (a technique Dr. Scott called orthokinesiology), and also checked Mr. Barzini's coordination while he and Mr. Barzini jogged in place. TR III/314-316, 332-333, 335.

132. The I.G. did not prove by a preponderance of the evidence that Dr. Scott "knew or had reason to know" that the services he provided to Luigi Barzini on Febuary 2, 1982, were not psychotherapy services, as claimed. TR IV/121-122; FFCL 136-138, infra.

133. Dr. Scott "knew or had reason to know" that he had not provided psychotherapy services to Luigi Barzini on December 11 and 22, 1981; January 13 and 28 and February 17, 1982, as claimed. I.G. Ex 1B, 2,3.

134. Danny Brock (an alias used by Bureau of Medi-Cal investigator Dan Beall) did not have either an appointment or an office visit with Dr. Scott on December 2 and 30, 1981, January 14, and February 4 and 18, 1982, as claimed. I.G Ex 7A, 7B, 35, 36.

135. Dr. Scott certified on December 30, 1981 that he provided psychotherapy services to Danny Brock on December 2 and 30, 1981; Dr. Scott certified on February 5, 1982, that he provided psychotherapy services to Danny Brock on January 14 and 28, 1982; Dr. Scott certified on February 25, 1982, that he provided psychotherapy services to Danny Brock on February 4 and 18, 1982.

136. Danny Brock had an office visit with Dr. Scott on January 28, 1982. Mr. Brock paid for his visit with a MEDI sticker and offered to pay cash for certain vitamins he purchased from Dr. Scott. Instead, Dr. Scott took a second MEDI sticker from Mr. Brock in payment for the vitamins. Mr. Brock did not see Dr. Scott again, but ordered more vitamins by letter from Mr. Brock's purported new address 13/ in Oregon, offering two MEDI stickers in payment. Dr. Scott filled the order on February 23, 1982, crediting Mr. Brock $40 for the two MEDI stickers toward the purchase of the vitamins. I.G. Ex 7A, 42; TR VI/141-146.

13/ Dan Beall, AKA Danny Brock, used the Oregon address as an investigative tool.

sorts of things, including allergies, although he does not diagnose and treat allergies. Dr. Blumenkrantz concluded that psychology has accepted stress reaction, nutrition, biofeedback, relaxation, and even massage as techniques, but if he were to use them he would first have to take additional courses of study. TR VI/18-20, 116-118, 121.

142. Dr. Scott did not testify, but told State investigators that he does not like to call what he does "psychotherapy. He admitted that he did not talk with patients about their childhood, but refers them elsewhere for that more traditional kind of psychotherapy. He uses natural healing and described his techniques as psychotherapeutic tools. He asks clients what has been happening in their lives to help them relax. He treats emotional stress, which might cause symptoms of physical ailments. He helps clients rebalance their bodies by correcting that which upsets the balance. For example, his treatment of Luigi Barzini, who complained of back pain, consisted of getting Mr. Barzini to relax through applied kinesiology, (pressure to certain parts of the body) and the use of vitamins (to reduce muscle spasms). He said that he discussed food with Mr. Barzini because food is needed to function and food affects the emotions and the mind as well as the body. TR VI/130-132, 137, 161; I.G. Ex 40, 44, 45.

143. Dr. Scott's office took MEDI stickers from Natalie Harary, Lynn Keylor, Anne Peneff, Barbara Plourd, Lisa Short-Ibrahaim, Curtis Smith, Sharon Sooter, and Genevra Warden on occasions when they did not have "psychotherapy" sessions with him. Dr. Scott's office used the stickers as credits against amounts owed by these people toward the purchase of vitamins. I.G. Ex 23, 24, 26-31.

144. Dr. Scott's office took MEDI stickers from Ophelia Simon and credited her bill for vitamin purchases with a dollar value for the stickers. Some of these stickers were for other Medi-Cal beneficiaries, including James Murphy and Donald Wilkins. I.G. Ex 6D; TR IV/130-139.

145. Dr. Scott's office took MEDI stickers from Lyland Mills and credited his bill for vitamin purchases with a dollar value for the stickers. Some of these stickers were for Evelynne Mills, Lyland's wife. TR IV/80-81; I.G. Ex 6A.

146. Dr. Scott sent letters to Medi-Cal justifying reimbursement for one-and-one-half hours of psychotherapy sessions which he claimed he provided to James Murphy on August 26, 1981; Clubert Kregal on November 16, 1981; and Barbara Stotts on December 30, 1981. None of these people had office visits or appointments with him on those dates. I.G. Ex 1B/9A, 6A, 31A; I.G. Ex 6C, 13BA, 13B.

147. The Respondent did not prove by a preponderance of the evidence that the "psychotherapy" services which Dr. Scott claimed he provided to Joti Frank on May 26, 1982 were performed on another date. R Br Sept. 19, 1986, p. 5. Joti Frank's last previous office visit was on March 3, 1982. In May, 1982, her MEDI stickers were used to purchase vitamins. I.G. Ex 20A.

148. The Respondent did not prove by a preponderance of the evidence that the "psychotherapy" services which Dr. Scott claimed he provided to Patricia Pennington on May 28, 1982, were performed on another date. R Br Sept. 19, 1986, p. 5. Patricia Pennington's last previous office visit was in September 1981. Her May 1982 MEDI stickers were used to reduce a debit balance in her account with Dr. Scott, resulting from purchases of vitamins. I.G. Ex 22.

149. The Respondent did not prove by a preponderance of the evidence that the "psychotherapy" services which Dr. Scott claimed he provided to Akune Tanaban on May 24, 1982 were performed on another date. R Br. Sept. 19, 1986, p. 5. Akune Tanaban was never a client of Dr. Scott's. Akune's father, Sidney Tanaban, gave Akune's MEDI stickers to Dr. Scott in exchange for vitamins. I.G. Ex 18A.

150. The Respondent did not prove by a preponderance of the evidence that the "psychotherapy" services which Dr. Scott claimed he provided to Esther Campos on May 26, 1982 were performed on another date. R Br Sept. 19, 1986, p. 5. Esther Campos' last previous office visit for a full hour was in January, 1982. In May, 1982, her MEDI stickers were used to purchase vitamins from Dr. Scott. I.G. Ex 19A.

151. The Respondent did not prove by a preponderance of the evidence that the "psychotherapy" services which Dr. Scott claimed he provided to Roberta Nasser on May 27, 1982 were performed on another date. R Br Sept. 19, 1986, p. 5. Robert Nasser's last previous office visit was on May 6, 1982. On May 27, 1982, Dr. Scott certified that he provided psychotherapy to Roberta Nasser on May 13 and 27, 1982. Dr. Scott was reimbursed for both of those claims. I.G. Ex 1 B, 21.

152. The Respondent did not prove by a preponderance of the evidence that he would be unable, because of his financial condition, to pay the penalties and assessments imposed on him in this Decision and Order. R Ex G; TR VIII/6-55.

153. The Respondent did not prove by a preponderance of the evidence that letters from clients indicating their satisfaction with Dr. Scott's services should be a mitigating factor. R Ex F.

154. It is a mitigating circumstance that Sharone Negev had an office visit with Dr. Scott on December 16, 1981. I.G. Ex 14A, 14B; FFCL 88-91, supra.

155. Each of the 71 items or services proved false by the I.G. are subject to a determination under Section 1003.102 of the Regulations.

156. The maximum civil money penalties that could be imposed in this case is $142,000 ($2000 x 71 items or services). The Inspector General proposed penalties of $80,000 for 73 allegedly false items or services. Subtracting the two items or services not proved false and considering the aggravating and mitigating factors, I would impose penalties of $76,700.

157. The maximum assessment that could be imposed in this case is $8,820 (double the amount falsely claimed). The Inspector General proposed an assessment of $4,000 (45 percent of $8,940, which is double the $4,470 claimed for 73 items or services). Subtracting the claims for the two items or services not proved false and considering the aggravating and mitigating factors, I would impose assessments of $3800, using the 45 percent factor.

158. The penalties and assessment in FFCL 156 and 157 total $80,500. The I.G. agreed to offset this amount by $4,500, the amount of restitution paid by Respondent to the State Medi-Cal program. TR III/365. The remaining penalties and assessments total $76,000.

DISCUSSION

Simply stated, the two central substantive issues to be decided in this case are (1) whether the I.G. proved liability by a preponderance of the evidence and, if so, (2) whether the amount of the penalties and assessments proposed by the I.G. is appropriate (taking into account any aggravating or mitigating circumstances).

I. The I.G.'s Burden of Proof in This Case Is To Prove Liability By a Preponderance of the Evidence

The Respondent argues that this is a quasi-criminal proceeding and, as such, the burden of proof in this case should be "beyond a reasonable doubt" or "by clear and convincing evidence." I ruled on November 22, 1985 that this is not a "quasi-criminal" proceeding. Even if it were, section 1003.114(a) of the Regulations provides:

> (a) To the extent that a proposed penalty and assessment is based on claims and/or requests for payment presented on or after August 13, 1981, the Inspector General must prove by a preponderance of the evidence that the respondent presented or cause to be presented such claims and/or requests for payment as described in §1003.102. [emphasis supplied]

Thus, since all the claims and the 73 services in issue were presented after August 13, 1981, and section 1003.115 of the Regulations states that the ALJ has no "authority to decide upon the validity of federal statutes or regulations," the I.G.'s burden in this case is to prove the elements of liability by a preponderance of the evidence.

II. Interpretation of the Elements of Liability in the CMPL and Regulations

A. Generally

As stated earlier, the elements of liability are clearly set forth in the CMPL and Regulations and I have separated these requisite elements into seven parts solely for ease of discussion. 13/ Thus, for liability to be established in this case, the I.G. must have proven by a preponderance of the evidence that: (1) the Respondent (a "person") (2) "presented or caused to be presented" (3) the Medicaid "claims" in issue (4) to the Medi-Cal program ("agency") (5) for medical ("psychotherapy") 14/ "items or services" (alleged to be provided to Medi-Cal beneficiaries) when, in fact,

13/ The earlier discussion entitled "The Governing Law and Regulations" is incorporated herein by reference.

14/ The issue of what constitutes "psychotherapy" services under California (MEDI-Cal) law is discussed later.

(6) reimbursable psychotherapy services were "not provided as claimed" and (7) the Respondent "knew or had reason to know". For liability to be established, the I.G. must have proven each one of the individual elements of liability for each one of the 73 medical services in issue. All of the words and phrases in each of the elements of liability are straightforward, need little interpretation, and were not disputed by the parties (except for the last one, i.e., whether the Respondent "knew or had reason to know"). 15/

B. Defining Culpability or the Meaning of the Phrase "Knew or Had Reason to Know"

In the CMPL and Regulations, the most difficult element of liability to interpret or apply is the culpability standard, calling for a medical provider to "know" or have "reason to know" that the claims he presented were not provided as claimed. 16/

In arguing about the degree of culpability needed to be proven by the I.G. in this case, the Respondent, citing United States v. Mead, 426 F. 2d 118 (9th Cir. 1970), asserts that the Ninth Circuit requires the I.G. to prove "intent to defraud". The Mead case has no application here because it applies to the federal False Claims Act and not the CMPL and Regulations. The Respondent argues that Mead requires me to ignore the culpability standard set forth in the CMPL and Regulations or argues that the standard "knew" or had "reason to know" to require proof of "intent to defraud." See R Br/27; R Rep Br 9. In other words, the Respondent proposes a higher degree or culpabality than that set forth in the CMPL and Regulations; "intent to defraud" goes beyond knowledge. The Respondent's arguments are not persuasive. The CMPL and Regulations do not require the I.G. to prove "intent to defraud." Proof of knowledge or proof that the Respondent had "reason to know" are all that the CMPL and Regulations require for liability to attach. Regultions §1003.102(a)(1); CMPL §1320a-7a(1)(A). 17/ I am guided by the preamble to the Regulations which sheds some light on the interpretation of the phrase "knows or had reason to know," by declaring: "The statute sweeps within its ambit not only the knowing, but the negligent. . . ." 48 Fed. Reg. 38827, 38831 (Aug. 26, 1983). From this, I conclude that the phrase "knows or has reason to know" encompasses a spectrum where liability attaches on one end of the spectrum where a respondent files false claims with knowledge that they are false and on the other

15/ The Respondent argues, however, that the proof is insufficient to establish these elements of liability. R Br/14 to 17, 22 to 31. These arguments concerning the sufficiency of the evidence are addressed in the remaining sections of this Discussion.

16/ The CMPL and Regulations contain slightly different language with identical meaning. The CMPL states the standard as "that the person knows or has reason to know." §1320a-7a(1)(A) The Regulations states the standard as "the person knew or had reason to know". §1003.102(a)(1).

17/ It should be noted that proof of actual knowledge may also be considered to be an aggravating factor. Regulations §101.106(b)(2).

end of the spectrum where a respondent files false claims in a negligent manner.

The Respondent argues that there is no "spectrum" in that the phrase requires proof of "intent to defraud." The I.G. argues that proof of simple negligence is sufficient (but adds no explanation). The CMPL and Regulations do not state the degree of negligence necessary for liability to attach (e.g., gross or simple negligence) and do not actually define the phrase "knew or had reason to know." Thus, it is appropriate to interpret the breadth of the phrase so as to determine its limits.

(1) The Meaning of the Term "Knew (or "Knows")

It seems obvious that Congress in using the term "knows" and likewise the drafters of the Regulations in using the term "knew" were applying the plain meaning of the term. I thus conclude that the term "knew" (or knows) refers to conscious knowledge of a fact (or subjective knowledge). Accordingly, on one end of the spectrum we have the requirement that the I.G. prove conscious knowledge of the fact that a service was not provided as claimed. 18/

(2) The Meaning of the Term "Reason to Know"

In analyzing the term "reason to know", the Second Restatment of Torts (at §12) states:

> "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.

Thus, "reason to know" employs the reasonable man (objective knowledge) concept.

In discussing the objective knowledge concept, Dean Prosser, in Keeton and Prosser on Torts, states that one of the most difficult questions (in connection with negligence) "is that of what the actor may be required to know." The Second Restatement of Torts defines knowledge as the belief in the existence of a fact, which coincides with the truth." Second Restatement of Torts, §290, Comment b. Dean Prosser states that so far as objective knowledge goes, "it seems clear that the actor must give to his surroundings the attention which a standard reasonable man would consider necessary under the circumstances and that he must use such senses as he has to discover what is readily apparent."

18/ For a discussion of subjective knowledge and objective knowledge, see Seavy, "Negligence-Subjective or Objective," 41 Harv. L. Rev. 1, 17; see, also, Second Restatement of Torts §§289, 290.

In Ackerman v. Gulf Oil Corp., 555 F. Supp 93 (1982), the term "reason to know" was analyzed. The court cited the Restatement of Torts and stated that:

> "Reason to know" indicates or denotes that the actor has, within his knowledge, facts from which a reasonable person of ordinary prudence and intelligence might infer the existence of a certain fact in question. Alternatively, the actor would regard the existence of the particular fact in quesion as so legally probable that he would base his conduct upon the assumption that the fact existed.

The court then concluded:

> Mrs. Filder was in possession of information from which a reasonable person would have inferred the fact of causation. Accordingly, her conduct should have been governed by the assumption that such fact of causation existed. Therefore, she had reason to know the cause of her physical damage, and cannot be excused for her failure to file suit in a timely fashion.

(3) A Respondent as a Reasonable Medical Provider

The foregoing discussions concerning objective and subjective knowledge have direct applicibility here. Thus, a respondent is liable for false claims of which he had subjective or objective knowledge (within the meaning of the discussions), including those claims prepared by his agents or employees.

Moreover, a Respondent, who is a reasonable medical provider submitting claims and exercising ordinary care, at the very least would have made himself familiar with the the rules and regulations for presenting Medi-Cal claims. He would have determined whether the claims he submitted to Medi-Cal were for reimbursable services and whether the services claimed were actually provided. He would have checked the claims presented against his own ledger cards to ensure that the services for which he billed Medi-Cal were actually provided on those dates. Ignorance is no defense; a respondent becomes liable for remaining ignorant, especially, as here, when he, as a reasonable medical provider, has an obligation to conduct an intelligent inquiry concerning his submission of Medicaid claims. 19/

In addition, the Respondent in this case is liable under the CMPL and Regulations for the acts of his employee, Gail Hartman, because she (1) had authority to file Medicaid claims and (2) was

19/ See discussion in "Keeton and Prosser" on knowledge and care required of professionals such as psychologists (at pp. 185 to 193).

presenting those claims according to the specific instructions of the Respondent. He clearly knew what she was doing (subjective knowledge) because he told her what to do. Even if he did not know what she was doing he had reason to know (objective knowledge) since he signed the forms after she prepared them. I.G. Ex 46/5; TR III/311; TR IV/129. 20/ Thus, the Respondent had a duty to ensure that those claims being presented by Gail Hartman were for services provided as claimed because he caused the claims in issue to be presented.

C. Summary of the Proof viz-a-viz the Elements of Liability

With regard to all the elements of liability, I find that the I.G. has proven well beyond a preponderance of the evidence that:

(1) The Respondent was the acting party and there can be no doubt that the Respondent is a "person" within the meaning of the CMPL and Regulations. I.G. Ex 1A, 1B, 45/5, 46/6, 16, 18. The Respondent also signed the claims in issue. I.G. Ex 45/5, 46/10.

(2) The Respondent "presented or caused to be presented" the forty-six (46) claims at issue in this case for seventy-three (73) services. I.G. Ex 1A, 1B, 2, 45, 46.

(3) The forty-six (46) claims in issue for seventy-three (73) services are Medicaid "claims".

(4) The seventy-three (73) services in issue are a "medical or other item or service" that the Respondent claimed in each and every case to have provided to medi-Cal beneficiaries for either one (1) hour or one and one-half (1 1/2) hours of psychotherapy. I.G. Ex 1, 88/A-26; see also, CMPL §1320a-7a(h)(3).

(5) the claims in issue were received by CSC, the fiscal intermediary of the Medi-Cal program ("agency"). I.G. Ex 1B. (The Respondent was also paid by CAC. I.G. Ex 2.)

(6) Except in two instances, reimbursable psychotherapy services were "not provided as claimed."

(7) And, except in two instances, the Respondent "knew or had reason to know" the above. In fact, the Respondent had actual (subjective) knowledge in almost all the instances at issue.

The proof in the record supporting these findings is discussed next.

20/ See, Panama R. Co. v. Bossee, 249 U.S. 41, (1919); 53 Am Jur 2d, Master and Servant §404; Forrester v. Southern Pac. Co., 134 P. 753, 764, 36 Nev. 247 (1913); Curtis, Liability of Employers for Punitive Damages Resulting From Acts of Employees, 54 Chi-Kent L. Rev. 829-850 (1978). See also, Kellerman v. Askew, 541 F. 2d 1089 (5th Cir. 1976) King v. Horizon Corp., 701 F. 2d 1313 (10th Cir. 1983) (inadequate amount of supervision).

III. The Law concerning Requirements and Prodcedures for the Submission and Processing of the Medicaid Claims in Issue

At all times relevant to this case, CSC issued instructions to Medicaid providers, such as the Respondent, in the form of a "Provider Manual". The CSC Provider Manual in evidence (I.G. Ex 38), which was taken from the Respondent's office, makes it clear that (1) reimbursable psychology (including "psychotherapy") services are limited by California law to two per month for each Medi-Cal beneficiary and (2) there must be a valid MEDI sticker affixed to each claim for each psychotherapy service. CAC §§51502, 51304; TR II/247-250; I.G. Ex 5. The CSC Provider Manual sets forth the law for the submission of Medi-Cal claims, including the procedure codes for psychotherapy services. The procedure code for one hour of psychotherapy is 2361; the code for one and one half hour of psychotherapy is 2362. CAC §51503.3(g); I.G. Ex 38 at A-23. The Respondent was familiar with the procedure codes and the law for billing the Medi-Cal program. I.G. Ex 45, 46; TR III/317; TR IV/133. The CSC Provider Manual states that "direct patient care" must be rendered in order for psychotherapy to be reimbursable. I.G. Ex 38/A-24, to A-26; TR IV/66-67.

Under the Medi-Cal program, psychotherapy is a covered service when provided by a licensed psychologist. CAC §§51309(a), 51232. The Respondent was licensed in California as a psychologist during the time in issue. TR IV/32; I.G. Ex 44/2. He had offices in three locations: San Francisco, Larkspur, and Willits. I.G. Ex 45/2. Section 59999(a)(10) of title 22 of the California Administrative Code expressly provides that the Medi-Cal program does not pay a psychologist for viatamins or vitamin or nutritional supplements. A psychologist is not licensed to prescribe drugs. TR VI/31; Cal. Bus. & Prof. Code §2904. The Respondent was not licensed as a physician. TR IV/33.

Medi-Cal beneficiaries are issued Medi-Cal cards for each month with two types of stickers affixed to them: POE stickers, and MEDI stickers. 21/ There are only two MEDI stickers on each beneficiary's Medi-Cal card each month which can be used for psychology services. TR II/260-61; TR IV/137-39 CAC §51304.

A claim for psychology services must have a MEDI sticker for that beneficiary affixed to the claim form itself for each service before the claim can be paid. TR II/261. All the claims in issue filed by the Respondent for psychology services had to have MEDI stickers on them and did, in fact, have MEDI stickers on them. Id.; I.G. 1.

21/ POE stickers are to be given to physicians and hospitals for their services and are not relevant to this case.

The originals of the Medi-Cal claims submitted by the Respondent contain the following language on the back:

> The services listed on this form have been personally provided to the patient by the provider. . . . The provider understands that payment of this claim will be from Federal and/or State funds, and that any falsification, or concealment of a material fact, may be procesecuted under Federal and/or State laws.

CAC §51502(a). See I.G. Ex 37/2.

The front of the form just above the signature line reads:

> This is to certify that the information contained above is true, accurate, and complete and that the provider has read, understands, and agrees to be bound by and comply with the statements and conditions contained on the back of this form.

MEDI stickers are not to be treated as cash, or used as a credit for providing non-covered services. CAC §51486(a); TR II/269; III/300-02. It is not proper to use the MEDI stickers of persons other than the patient receiving psychology services. CAC §51486(b); TR II/265; IV/33, 35. In fact, the law (CAC §51486) expressly provides:

> (a) No provider shall remove more labels from a Medi-Cal card than are necessary to submit a claim for reimbursement for each service, drug, or item provided.
> (b) No provider shall remove any label from a Medi-Cal card to bill for any service provided to any person other than the beneficiary identified on the card.

The only types of psychology services that are covered by the Medi-Cal program include individual psychotherapy (one-half hour, one hour, or one and one-half hours), group therapy, family therapy, psychodiagnostic services and case conferences. Id. The procedure codes for these services are set out in the Medi-Cal regulations at CAC §51505.3(g). In order to be reimbursed for psychotherapy services, the psychologist must spend a particular amount of time with the patient, providing psychotherapy. TR IV/66-67; I.G. Ex 38/A-26.

IV. The Respondent's Records, His Medi-Cal Participation, and His Abuse of MEDI Stickers

The Respondent saw both private clients and Medi-Cal clients as a licensed psychologist during the time period in issue. For the years 1980 to 1982, the Respondent was paid about $100,000 by the Medi-Cal program. TR V/18, TR VII/49, 50; I.G. Ex 44:

A thorough study of the Respondent's records, combined with the testimony of Mario Piazza, Dan Beall, and Esther Campos, prove that the Respondent had knowledge of the fact that most of the services in issue were not provided as claimed. I find that, in the majority of cases, the Respondent either sold vitamins instead of performing reimbursable "psychotherapy" services or the client was not present in the Respondent's office on the claimed date of service. There were many cases where the Respondent took the MEDI sticker of a person (a friend or relative of one of his clients) and used that sticker to apply to the sale of vitamins or to apply to the balance of one of his clients.

The Respondent kept meticulous records. It is these very records that demonstrate the Respondent's scheme to submit false claims.

I note a very important distinction. I make no finding as to whether the Respondent "knew or had reason to know" that he did not provide therapeutic services to his clients. I make a finding that the Respondent "knew or had reason to know" that he did not provide reimbursable "psychotherapy" services as claimed. This distinction is based on the fact that the Respondent knew what Medi-Cal reimbursed and armed with that knowledge submitted false claims. I find that the record is not so clear, however, with regard to two instances where the I.G. acknowledges that the Respondent actually performed services, but argues that those services were not reimbursable "psychotherapy" services; The I.G. did not prove its case on this issue by a preponderance of the evidence (as will be discussed, infra). In summary, with regard to the majority of the 73 services in issue, the Respondent clearly had knowledge (or "reason to know") that the services that he claimed payment for were not provided as claimed. With regard to just two of the 73 services in issue, the record does not justify a finding that when the Respondent actually performed services, those services were not reimbursable "psychotherapy" services.

There were two kinds of records kept in the Respondent's office. There were (1) billing account records (containing (a) pink slips or vouchers and (b) ledger cards), and (2) patient files (containing (a) yellow receipts or vouchers and (b) patient notes). I.G. Ex 45 at 3, 6A-31. I.G. Ex 6A-31. Vouchers were written either for patient visits, (I.G. Ex 8A/1) or for sales of vitamins (Id. /4). The pink copy of each receipt was kept in the billing account record; the white copy was given to client; the yellow copy was placed in the patient's file. TR III/317-319; VII/117;

I.G. Ex 46/18, 39, 40. Entries were made on ledger cards that corresponded to each transaction (either for office visits or for sales of vitamins). These entries reflected the type of service, the voucher number that had been issued to the client, the charge for that service, the method of payment, and the running balance. I.G. Ex 6D/2-6. There were two different types of services reflected in the ledger cards: "OV"s, (i.e., office visits, TR IV/39) and "Supp."s, (i.e., sales of supplements or vitamins, Id.) It is most important to note that these entries on the ledger card, the entries on the vouchers (or receipts) in the billing account record, and the vouchers in the patient files are all consistent with each other. TR III/350-53; IV/44, 53-54, 69-71.

In the billing account records (both on the ledger cards and on some of the receipts) of Medi-Cal beneficiaries, the Respondent treated MEDI stickers as having a value of $20.00. During the revelant time period, Gail Hartman was the Respondent's secretary and receptionist and did the Respondent's Medi-Cal billing according to his instructions. I.G. Ex 45, 46. The Respondent and Gail Hartman told clients that a sticker could be applied for up to $20.00 worth of credit against vitamin purchases or for one office visit. When the Bureau of Medi-Cal investigator pointed out to Respondent that his office was being reimbursed $28.67 for these MEDI stickers, Dr. Scott did not have a ready explanation for this discrepancy. I.G. Ex 45. Gail Hartman was familiar with the procedure codes and the provider manual. TR II/268; TR III/300; I.G. Ex 44/1; TR VII/114, 116, 124, 126. MEDI stickers were credited against the client's balance, which generally had accumulated from the sale of vitamins. Id.

My review of the billing account records in evidence reveals that the I.G. proved well beyond a preponderance of the evidence that the Respondent treated MEDI stickers as being worth $20.00 worth of credit. See I.G. Ex 6A/31. A particularly clear example is I.G. Exhibit 6B, where the entry for December 2, 1981, at page 2, reflects the receipt of two December MEDI stickers, which are treated as $40.00 in credit against the patient's outstanding balance. See also, entries for November 10, 1981; May 20, 1981. Similarly, the ledger card in I.G. Ex 16, expressly states that two MEDIs were worth $40.00 in credit. See entry for June 8, 1982. Id./2.

The record proves that the Respondent actually told clients that MEDI stickers could be used in payment for the vitamins he sold (such as when he told this to Dan Beall when he was undercover and known as Danny Brock - TR VI/142) (and when he told this to Mario Piazza when he was undercover as Luigi Bargini - TR III/338). In addition, for some of the Respondent's clients, MEDI stickers were the only form of payment (see I.G. Ex 6B/2, 3, I.G. Ex 6D/2-7; I.G. Ex 9/2). For others, payment was accepted in a combination of MEDIs and cash. I.G. Ex 10A; I.G. Ex 13A.

As stated above, I find that the record demonstrates that the Respondent kept careful records and that all the entries in the patient files, the entries on the ledger cards, and the vouchers are consistent with each other. In other words, the entries in the patient files and the "OV" vouchers match the "OV" entries in the ledger cards. The "supp." vouchers match "supp." entries on the ledger cards. See, TR III/350-353; IV/39, 44-45.

All of the patient files and billing account records put into evidence in this proceeding were seized pursuant to a search warrant of the Respondent's office executed by the California Bureau of Medi-Cal Fraud. II/201-209; TR III/345, 347-348. (See I.G. Ex 5 - search warrant return.) The bulk of the Respondent's records were kept at the Respondent's office in San Francisco, at 649 Irving Street. I.G. Ex 46 at 7, 19; I.G. Ex 45 at 2. 22/

There were some records that were not found in the search. With respect to certain beneficiaries (in whose names claims at issue in this proceeding were filed) no billing account records or patient files or both were found in the search. These missing files were sought in discovery by the I.G. on August 22, 1985. By letter dated September 27, 1985, the Respondent's attorney, Mr. Gould, indicated that the requested files were not in the possession of the Respondent. Accordingly, I infer that those files now in evidence reflect all of the files that the Respondent had relating to the beneficiaries named in the claims in issue. (The Respondent objects to the use of the Respondent's records in this case. These objections are addressed in a later section in this Discussion.) 23/

I find that the record establishes that the Respondent knew that the Medi-Cal program did not pay for vitamins and that he told Mr. Piazza so (in Piazza's undercover identity as Luigi Barzini). TR III/334. He also told this to Esther Campos, one of his patients who testified at the hearing. TR VII/141, 144. I.G. Ex 45/21. Cf. id. at 30. The Respondent's secretary, Gail Hartman, also knew that the Medi-Cal sticker was to be used solely for psychotherapy services and not for the sale of vitamins ("supps"). I.G. Ex 46/12, 15, 18; TR III/311.

22/ The Respondent and Gail Hartman also kept appointment books; (I.G. Ex 35, 36, 46) TR II/235-240; TR IV/93 and all of the appointment books found in the search were seized. TR II/240; IV/87, 89.

23/ Pursuant to my Ruling dated November 22, 1985, the patient files that were admitted into evidence, with the exception of the ones for Mr. Barzini (I.G. Ex 8B) and Mr. Brock (I.G. Ex 7B), were sanitized to indicate only the names of the clients and dates of their transactions in order to protect the client's privacy.

V. The Evidence in the Record Establishes that the Respondent "Knew or Had Reason to Know" the Claims in Issue were Not Provided As Claimed, Except in Two (2) Instances

A. Generally

In 71 of the 73 items or services as claimed, Dr. Scott did not have a scheduled appointment or an office visit with the named Medi-Cal beneficiary on the date listed. I.G. Ex 1B, 6A-22, 35, 36. With regard to 25 of the 71 services claimed, the alleged date was one for which Dr. Scott's appointment books showed no appointments. Id. Thus, the Respondent's records provide strong proof that the claims at issue not only were false, but that Dr. Scott knew or had reason to know that they were false. In addition to the lack of documentation supporting the claimed service dates, these records show that 27 of the items or services claimed were purportedly for Medi-Cal beneficiaries who never were clients of Dr. Scott. This was confirmed by one of the beneficiaries, Evelynne Mills, in a taped interview with Medi-Cal investigator Mario Piazza. See FFCL 38 and I.G. Ex 47. Twelve of the items or services claimed were listed under her name. Six other beneficiaries, named in another 15 items or services falsely claimed, were also conspicuous by the absence of billing ledger cards, receipts, or any other evidence of their having been a client of Dr. Scott's. These were Donald Wilkins (FFCL 48), Nikki Najera (FFCL 64), Hadley Stotts (FFCL 85), Akune Tanaban (FFCL 104), Reginald Tanaban (FFCL 108), and James Murphy. 24/

Dr. Scott needed the MEDI stickers of these non-clients in order to make his fictitious claims appear legitimate, so he obtained them from relatives or other persons closely associated with the beneficiaries. MEDI stickers which only Evelynne Mills could use, for psychotherapy and other specified therapeutic services, were given to Dr. Scott by her husband, Lyland, in exchange for a credit balance of $300 in Lyland's account with Dr. Scott. FFCL 145. Similarly Ophelia Simons gave Dr. Scott MEDI stickers assigned to Donald Wilkins and James Murphy in exchange for a credit balance which she used to purchase vitamins. FFCL 144. Ms. Simons was a co-defendant with Dr. Scott and Gail Hartman in a State Medi-Cal criminal action involving false claims. 25/ I.G. Ex 49, TR VIII/100.

24/ James Murphy did tell Mario Piazza that he saw Dr. Scott once, in 1980. TR IV/140. There was no record of an office visit with Dr. Scott in 1980 or at any time.

25/ The parties here stipulated that the $4500 restitution which Dr. Scott paid, as part of the agreement by which he pled no contest to the State charges, would be deducted from any penalties and assessments I might impose. TR III/365. I have done so. FFCL 158.

MEDI stickers which could legally be used only by Michelle and Nikki Najera, Hadley Stotts, Akune and Reginald Tanaban, Julienne Malecot and Owyhee Webb were given to Dr. Scott by the parents of these children in exchange for credits to the account balances of the parents, and used to purchase vitamins. FFCL 61, 65, 69, 73, 82, 101. In addition to the situations mentioned above in this and preceding paragraphs, the record contains numerous instances of Medi-Cal beneficiaries giving their MEDI stickers to Dr. Scott in exchange for credits toward the purchase of vitamins. FFCL 42, 52, 56, 57, 61, 73, 77, 89, 97, 113, 117, 121, 129, 136, 143, 144, 145, 150. The MEDI stickers so obtained were placed on the claims on which Dr. Scott falsely certified that he provided psychotherapy services in exchange for the MEDI stickers.

As noted in my Findings and in the Discussion above, most of the claims at issue were false because Dr. Scott did not have an office visit with the named client (beneficiary) on the indicated date claimed, and, thus, he knew or had reason to know that he was not entitled to be reimbursed for having provided psychotherapy services to the client on that date as claimed. In two instances, however, Dr. Scott did have an office visit with the named client on the date claimed.

B.) Two Instances Where Services were Actually Performed On the Date Claimed

The two instances in question involve visits by Mario Piazza and Dan Beall, investigators of the Bureau of Medi-Cal Fraud acting as undercover agents. Both testified at the hearing and their account of what happened on the two dates in question is set out in my Findings. FFCL 131, 137. In addition, during a taped interview with Bureau of Medi-Cal Fraud investigators, Dr. Scott described his treatment of Luigi Barzini (Mario Piazza). FFCL 142. The issue is whether the I.G. proved by a preponderance of the evidence that Dr. Scott knew or had reason to know that the services he provided were not "psychotherapy."

Expert witnesses who testified for the I.G. and Dr. Scott had opposing views as to whether the treatment of Barzini and Danny Brock (Dan Beall) constituted "psychotherapy". Dr. Jack Blumenkrantz, Ph.D., a psychologist, (the I.G.'s expert witness on the issue), held the opinion that it was not; Dr. Richard Kunin, M.D., a psychiatrist, (the Respondent's expert witness on this issue), felt that it was. While I found Dr. Kunin's testimony to be extremely interesting, I gave it little weight concerning this

issue because Dr. Kunin never persuaded me that he could speak authoritatively on the subject of what a psychologist does as "psychotherapy" in California, according to California law. He was, however, well versed on psychology and psychotherapy as a concept in general.

Dr. Blumenkrantz had practiced and taught psychology and was a member of the body which certified psychologists in California, so he could, and did, speak with considerable authority on this issue.

Despite the authority of the I.G.'s expert, I found that the I.G. ultimately failed to prove by a preponderance of the evidence that Dr. Scott knew or had reason to know that he had not provided "psychotherapy" services to Barzini and Brock. Dr. Blumenkrantz admitted during re-cross examination that techniques like those used by Dr. Scott are thought by some psychologists, including respected ones, to be "psychotherapy". FFCL 141. Moreover, as my findings indicate, the definition of psychology in the California Professional Code is very broad. FFCL 140.

Thus, since the testimony of the I.G.'s own expert is that respected psychologists believe these techniques to be "psychotherapy," the I.G. has not proven that Dr. Scott is liable for filing false claims in these two instances on the grounds that the services provided were not "psychotherapy"

C. Instances Where Services were Performed on Another Date Close to the Date Claimed (Alleged Clerical Errors)

In addition to the two instances discussed above, where Dr. Scott had an office visit on the date claimed, I found six instances where Dr. Scott provided services to the named individual on another date in the same month as the claimed date. The question is whether these were "psychotherapy" services.

1) Services not proven by the Respondent to be "psychotherapy"

Five of these instances were office visits which the Medi-Cal undercover agents had with Dr. Scott. Mario Piazza had office visits with Dr. Scott on December 23, 1981, and January 5 and 19, 1982. 26/ Dr. Scott falsely claimed psychotherapy sessions with Luigi Barzini (Piazza) on December 22, 1981, and January 13 and 28, 1982. Dan Beall had office visits with Dr. Scott on December 17 and 23, 1981. Dr. Scott falsely claimed psychotherapy sessions with Danny Brock (Beall) on December 2 and 30, 1981. Thus, there are potentially five parallel service dates for five of the dates falsely claimed.

26/ The billing ledger card and the office visit receipt indicate that the January 19, 1982 visit lasted only 3/4 hour. There is a procedural code for either 1/2 hour or one hour, but not 3/4 hour. Moreover, Mr. Piazza testified that the visit lasted one hour. TR III/133.

Although I find the Respondent liable under the CMPL for the dates falsely claimed, I would have considered it a mitigating circumstance if the Respondent had proven by a preponderance of the evidence that the services he provided on the five parallel dates were "psychotherapy" services reimburseable under Medi-Cal. Looking once again at the testimony of the two agents, of the two expert witnesses, and of Dr. Scott, I find that Respondent did not meet the necessary burden of proof.

This finding may seem to conflict with my earlier holding that Dr. Scott was not proven to have filed false claims for office visits with Barzini (Piazza) on February 2, 1982, and Brock (Beall) on January 28, 1982, but it does not. There is no conflict because the burden of proof has shifted. In my earlier holding, I found that the I.G. had not shown by a preponderance of the evidence that Dr. Scott knew or had reason to know that the services he provided to Barzini and Brock on those dates were not "psychotherapy" services. I did not find that the services were psychotherapy or even that Dr. Scott legally might be entitled to reimbursement for those services under Medi-Cal. Dr. Scott might have a mistaken, but sincere and even well-founded conviction, that he provided "psychotherapy" services, so that he is not liable under the CMPL and Regulations. At the same time, what may be a sincere and well-founded conviction on the part of Dr. Scott does not make the services he provided to Barzini and Brock on those five dates "psychotherapy", by a preponderance of the evidence.

2) Services assumed to be "psychotherapy"

There was one instance in which a client had an office visit with Dr. Scott which would be mitigating if Dr. Scott provided psychotherapy services on that date. Sharone Negev had an office visit with Dr. Scott on December 16, 1981; Dr. Scott claimed reimbursement as though he had provided psychotherapy services on December 30, 1981.

I find the office visit on December 16, 1981 to be mitigating. Thus, these services mitigate the services falsely claimed to have been provided on December 30, 1981. The I.G. did not allege, much less prove, that Dr. Scott claimed reimbursement for services to Sharone Negev on December 16, 1981. Given the possibility of simple clerical error to explain the erroneous date of service claimed, for the purposes of mitigation I accord Dr. Scott the benefit of any doubt as to whether he provided psychotherapy on that date.

I emphasize here, as I did in the preceding section, that I do not find that Dr. Scott actually provided psychotherapy services on that date. The I.G. did not prove that he did not provide

psychotherapy. The I.G. had this burden of proof because it based its proof on the falsity of the claims on the Respondent's office records. These records prove that Dr. Scott provided services on the date in question. There is no testimony or other proof that "psychotherapy" services were not provided during that office visits. The experiences of Medi-Cal investigators Piazza and Beall and Medi-Cal beneficiary Esther Campos were not offered as proof of what happened during the office visits of other clients, nor does the taped interview of the Medi-Cal investigators with Dr. Scott shed any light. TR IV/21, 22; I.G. Ex 45.

3. No other dates are mitigating.

Respondent argued in effect in his September 19, 1986 brief on mitigating circumstances (p. 5) that in four other instances "psychotherapy" services were performed on dates other than the date of service. As I set out in greater detail in my findings, one of these involved Akune Tanaban, who was never a client of Dr. Scott's and whose father gave Akune's MEDI stickers to Dr. Scott in exchange for vitamins. Two others, Esther Campos and Joti Frank, only purchased vitamins from Dr. Scott on the dates in question, using their MEDI stickers. The fourth, Patricia Pennington, had not been in for an office visit for approximately eight months, but on the date in question and other dates, routinely sent or brought in her MEDI stickers to reduce a long-standing large debit balance resulting from the purchase of vitamins. If these are the "services" for which Dr. Scott was billing, the circumstances were aggravating, not mitigating.

D. There was no Ambiguity or Lack of Proof Regarding Certain Claims for Services Allegedly Provided to Luigi Barzini and Esther Campos

The Respondent argued that the evidence purporting to prove that Dr. Scott's claim that he provided psychotherapy services to Luigi Barzini (Piazza) on December 11, 1981 was false was insufficient because Mr. Piazza's testimony about that claim was ambiguous. R Br/28.

Responding to my question about the duration of the Medi-Cal investigation of Dr. Scott, Mr. Piazza testified:

> Let's see. As a private patient, I started October 1st and as a Medi-Cal patient, it started sometime in December; at the very beginning of December. (TR III/306.)

After further questioning, Mr. Piazza made it clear that the investigation began in October and continued through February, and that his first office visit with Dr. Scott as a Medi-Cal patient was December 23, 1981. The Respondent does not specify exactly what was ambiguous about Mr. Piazza's testimony, but apparently read the testimony above to mean that Mr. Piazza initially testified that the office visit was at the beginning of December.

There is no ambiguity. Mr. Piazza testified in at least two other places that his visit with Dr. Scott in December 1981 was on the 23rd. TR III/313, 319. Dr. Scott's office records show only one office visit for Luigi Barzini (Piazza) in December 1981--the 23rd. What may have been a reference by Mr. Piazza to an early December transaction with Dr. Scott's office may be explained by Piazza's testimony that on December 3, 1981, Luigi Barzini (Piazza) had a telephone conversation with Gail Hartman at which time she scheduled the December 23 appointment, among other things. TR III/311-313.

The Respondent also argued that there was no evidence that Esther Campos was not in Dr. Scott's office on May 26, 1982, or that she purchased vitamins from Dr. Scott on that date, using MEDI-stickers. The Respondent relied on testimony by Esther Campos that Dr. Scott's secretary told her in 1981 that Medi-Cal did not pay for vitamins and that when Ms. Campos found that out, she started to pay for her vitamins "and the Medi-Cal sticker was just for the visit." TR VII/141, 145.

Ms. Campos went to Dr. Scott for approximately eleven months, starting in July 1981. I.G. Ex 19A. She testified she could not remember when she paid cash and when she used her MEDI stickers to pay for vitamins, but Dr. Scott took MEDI stickers from her in exchange for vitamins even after his secretary told her Medi-Cal did not pay for vitamins. TR VII/144-146. Dr. Scott's office records show that he did not have a one hour office visit with her after January 1982, and only two half-hour visits, in March and April, 1982. I.G. Ex 19A. During that time, through May 27, 1982, she purchased vitamins with cash and MEDI stickers. Id. Clearly, Dr. Scott did not provide "psychotherapy" services or any other services to her on May 26, 1982. Id

VI. The Respondent's Evidentiary and Due Process Defenses, Objections, and Motions

The Respondent defends this case primarily by collateral, evidentiary, and due process attacks against the I.G.'s case. 27/ Although numerous and scattered, most of the Respondent's evidentiary and due process arguments can be broken down into just a few general catagories for purposes of discussion (as does the Respondent in his briefs and proposed findings and conclusions). 28/ The Respondent (1) alleges "delay", resulting in a denial of due process, (2) attacks the admissibility evidence and testimony in the record presented by the I.G. (on numerous grounds, including a motion to strike almost all the evidence in the record because it is the fruit of an "illegal search"), and (3) attacks the I.G.'s characterization and interpretation of the evidence. With one major exception, there is little or no actual rebuttal evidence presented by the Respondent. The Respondent admits, in effect, in his "Brief on Mitigating Circumstances," (at p. 4) that if the ALJ rejects the Respondent's sufficiency of evidence and due process arguments, and the I.G.'s evidence is accepted, the Respondent's liability for filing false or improper claims has been proven.

No matter how numerous or how difficult, or whether they appear to have merit on their face, due process arguments should always be considered seriously because "the right to be heard before being condemned to suffer grievous loss" is a basic principle of our law. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Justice Frankfurter in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951). Moreover, "fundamental fairness" must be employed in this action. Regulations, §1003.115(a).

A.) There was No Denial of Due Process to the Respondent by the I.G.'s Initiation of These Proceedings on March 1, 1985

Oliver Wendell Holmes stated some 62 years ago, in Frank v. Mangum, 237 U.S. 309, 347 (1914):

> whatever disagreement there may be as to the scope of the "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial with opportunity to be heard.

27/ Other evidentiary and due process defenses were raised in the answer or in prehearing motions. More were raised at the hearing (in fact, they were peppered throughout the transcript). Most of these defenses are restated in the Respondent's post-hearing briefs or in his proposed findings and conclusions.

28/ For other evidentiary, procedural, or due process questions addressed or disposed of during the prehearing process, see the November 22, 1985 Ruling, and various written summaries confirming Rulings. For others not addressed in the Respondent's briefs, see generally, TR/I to VIII.

The Respondent makes several principal due process arguments. First, the Respondent argues that the I.G.'s "unreasonable delay" in starting this proceeding resulted in depriving the Respondent "of procedural due process." R Rep Br/1; R Br/1 to 21. Second, the Respondent argues, more particularly, that he was denied his "right to cross-examine the witnesses against him" because the delay resulted in witnesses (several beneficiaries) "not being available for cross-examination", and that if they had been present they might have supported his case. R Rep Br/1. Third, the Respondent also argues that the delay resulted in only partial evidence being presented to the ALJ and resulted in the failure of recollection of the remaining witnesses.

For several reasons, I conclude that the Respondent's claims are without factual or legal merit and that the Respondent has had the opportunity of a full and fair hearing.

First, this case was timely filed. Although (1) the Respondent is understandably frustrated by having to deal with actions brought against him by arms of both the California State government and the federal government against him, and (2) there was a lapse in time from when the State Medi-Cal investigation and State criminal case were completed to when this case was initiated by the I.G., this case, nevertheless, was initiated within the time limitations set forth in §1003.132 of the Regulations. Moreover, once this action was filed, the Respondent contributed to delay. At the Respondent's request, the hearing in this case was put off from the original date it was scheduled in October of 1985. When the hearing did begin in December of 1985, it soon became clear that it could not be completed in the allotted time, and was continued until February 1986. This date was put off again, at the Respondent's request, until May 1986, when the hearing was completed. Furthermore, even if there were merit to the Respondent's claim that there was a delay in this case constituting a denial of due process, the Respondent would have to demonstrate that he was substantially prejudiced. See Ka Fung Chan v. INS, 634 F. 2d 248, 258 (5th Cir. 1981). The Respondent did not demonstrate this.

Second, the Respondent was not denied due process by not having the right to cross-examine witnesses against him because the I.G. proved liability not with hearsay statements of beneficiaries, but with the Respondent's billing account records, the testimony of Medi-Cal investigators, and the actual testimony of a beneficiary. The direct testimony of beneficiaries supported the I.G.'s case; they all (Ms. Campos and Messrs. Beall and Piazza) testified that the Respondent accepted MEDI stickers in payment for the vitamins they bought. TR III/338; VI/142; VII/114.

Any hearsay statements of beneficiaries were merely the frosting on the cake; they were cumulative and corroborating statements. Moreover, the Respondent failed to meet his burden of showing

that the beneficiaries were actually unavailable. Richardson v. Perales, 402 U.S. 389 (1971). 29/ The Respondent put into evidence several Affidavits of Andrew Kangas, an investigator he hired to locate beneficiaries. R Ex D. I find that Mr. Kangas did not make a complete search. He made no attempt to find Sharone Negev, despite the fact that the I.G. investigator found her through the telephone directory. TR VII/45. There is no evidence that Mr. Kangas looked for Patricia Pennington or Sidney Tanaban. There is nothing to indicate that the Mr. Kangas ever actually sought to find Roberta Nasser at the address provided to the Respondent by the I.G. or to find Rue Burlingham or Deborah Webb. See R. Ex. D/2, 3, 6. Mr. Kangas went to Miss Mills' residence once, on December 6, 1985, but never followed up. Accordingly, I find that with a more complete search, he might have located the following beneficiaries: Webb, Negev, Sidney Tanaban, Pennington, Sachs, and Cecilia Najera. See R Br/n 6. There is evidence in the record that the Respondent was not really interested in finding the beneficiaries and that this defense was perhaps an attempt to distract me from the realization that the testimony of these witnesses would not have helped the Respondent case. Where the location of certain beneficiaries was known, the Respondent made no effort to call them as witnesses. The Respondent was clearly aware of Ms. Cecilia Najera's whereabouts, knew that she was available, and did not call her. TR IV/144-145, VI/155.

Finally, with regard to the Respondent's arguments concerning the failure of the Medi-Cal Fraud investigators to have independent recollection of the facts concerning their investigation of the Respondent, I find that, while they had trouble remembering exact dates of occurences without referring to their report of investigation, the investigators had excellent recall of the substance of the matters testified to and I find them to be credible witnesses.

It is worth noting that there is no absolute right to witnesses by the Respondent where they would not be helpful to his case, and where he actually chose not to call other similarly situated witnesses. Even in criminal cases, the right to the testimony of such witnesses is not absolute. United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). A defendant has to make a plausible showing of how the witness' testimony would have been both material and favorable for a court to find that due process has been denied. Id. Martin-Mendoza v. INS, 499 F. 2d 918 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975); Arthur Murray Studio of Washington, Inc. v. FTC, 458 F. 2d 622, 624 (5th Cir. 1972). 30/

29/ Since the burden of producing these witnesses is on the Respondent, the fact that the Inspector General did not find or produce them is irrelevant.

30/ It should also be noted, contrary to the Respondent's assertions, that the doctrine of laches is not applicable here because (1) there is an express period of limitations in the Regulations and (2) the well-established rule is that laches does not run against the United States. United States v. Summerlin, 310 U.S. 414, 416 (1940).

B.) The Search of the Respondent's Office and the Seizure of His records by Medi-Cal Investigators (1) Was a Valid Search and Seizure and (2) is Collateral to This Proceeding

The Respondent's next major defensive argument involves objections to how most of the records and documents in evidence were originally obtained by Medi-Cal investigators. The Respondent argues that most or all the I.G.'s documentary evidence and the testimony of most of the I.G.'s witnesses should be stricken because it was obtained from an illegal search and seizure.

Most of the evidence in the record that is damaging to the Respondent consists of his own business records. The Respondent's records that are in evidence in this case (i.e. billing account records, patient files, other office records) were obtained through a search conducted by California Medi-Cal fraud investigators. A copy of the search warrant and return are in evidence in this case. I.G. Ex 4A/5.

The Respondent argued that these records cannot be used by the I.G. to prove liability because they were the fruits of an illegal search. The Respondent argued that the search was flawed essentially for two reasons. First, the Respondent argued that the search warrant contained no indication on its face that there was probable cause for issuance of the warrant. TR II/178-179. Second, the Respondent argued that the special agent in charge of the search (special agent Mario Piazza) "substituted his own judgment" for that of the Magistrate who issued the warrant in that the special agent took only certain records referred to in the warrant rather than all the records referred to in the warrant. TR V/175-200 and TR II/192.

The I.G. argued that the validity of the search warrant was not properly an issue in the case since it was not raised in the previous State criminal proceeding and, therefore, was waived. TR II/179-180. The I.G. also argued that even if the State court had found the evidence to be the fruits of an illegal search warrant, the evidence would be admissible in this proceeding because it is a federal administrative proceeding. The I.G. cited the case of United States et. al v. Janis, 428 U.S. 433 (1976) as support. TR V/151-152. The I.G. also argued that the search warrant was offered by the I.G. only to show what items had been taken from Dr. Scott's office, not to establish the validity of the warrant. TR II/179.

I find and conclude that the evidence in this record presented by the I.G. should not be stricken. The search was a valid search. The facts surrounding the search were thoroughly testified to in the hearing in this case. First, there is ample evidence that probable cause existed for issuance of the warrant; the affidavit which was submitted to the Magistrate in support of the

warrant specifically stated facts which constituted probable cause. I.G. Ex 4B/4-7; TR V/189-190. Second, the special agents who conducted the search gave the required Miranda warnings and presented a copy of the warrant prior to conducting the search. I.G. Ex 45, 1 and 32, and FFCL 36. Third, there are no facts in the record that support the Respondent's assertion that the search was conducted without "judicial authorization." There is substantial evidence to support a contrary conclusion. The search warrant itself specified what items were to be searched for and seized. I.G. Ex 4A. The special agents took nothing that was not identified in the warrant (or in "Exhibit I," (I.G. Ex 4-C) attached to the warrant). TR II/189, TR V/199-205. Moreover, there is evidence that the Magistrate who issued the warrant was aware that the agents were not planning to take everything specified in the warrant. TR V/204. It would be unreasonable to conclude that because an investigator did not seize every item referred to in a warrant, he was on a "frolic" of his own, exercising his own judgment rather than that of the Magistrate. TR V/179. It is, in fact, reasonable for an investigator to exercise judgment in gathering evidence. It is the very nature of an investigators' job to do so. Moreover, it is particularly clear that his action was reasonable under the circumstances of this case where to gather all the voluminous records would have been impracticable. TR V/201.

Moreover, even if the warrant and search were flawed, challenges to the warrant and the search itself are barred in this proceeding by the doctrines of laches and waiver, in that the Respondent failed to raise the issue of the validity of the search in the State criminal court (the court having jurisdiction to decide the issue). (See TR II/176 and TR V/156).

Furthermore, even if the warrant and search were flawed and the Respondent had not waived his right to raise the issue here, the evidence would still be admissible in this case under the doctrine of Janis, supra. In Janis the Court held that evidence illegally seized by state law enforcement officials and, therefore, inadmissible in a state criminal proceeing was, nevertheless, admissible in a federal civil proceeding. The Court stated that the reason for the exclusionary rule was to deter illegal conduct by law enforcement officers. The Court reasoned that it was unlikely that exclusion of the evidence from the federal civil proceeding would deter illegal law enforcement conduct by officials of a separate sovereign, the state. Thus, the Court concluded, the societal benefit of determining illegal law enforcement conduct was outweighed by the societal benefit of allowing the

evidence. Janis, supra, pp. 453454, cf. Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). 31/

The Respondent's attempt to distinguish the Janis case on grounds that the State investigators were essentially federal agents is to no avail. TR V/152. The Respondent argued that since the State investigators' salaries derived from federal funds, they were effectively federal employees or agents. TR V/153-155. This argument is unconvincing. The investigators were employed by the Medi-Cal Fraud unit of the California Attorney General's Office. There is no evidence in the record that they were paid, supervised, or directed in any way by the federal government. TR V/153. That some of the funds used to pay their salaries ultimately came from federal sources is not sufficient to alter their character as State employees or not sufficient for me to find the requisite "control" over the State case by the federal government. See United States v. Montana, 440 U.S. 147 (1979). Nor is the doctrine of equitable estoppel applicable here. See United States v. Bureau of Revenue, 531 P. 2d 212 (N.M. Ct. App. 1975).

31/ Moreover, two generally well know principles of law are that (1) a conviction or acquittal of criminal charges does not preclude a civil action like the one here, and (2) successive state and federal criminal prosecutions are not precluded. Schweiker v. Hansen, 450 U.S. 785 (1981); United States v. Lasky, 600 F. 2d 765, 768 (9th Cir. 1978), cert. den. 444 U.S. 979 (1979). See TR V/158, 159.

C.) The Evidence in This Record Which was Presented by the I.G. is Reliable, Substantial, and has Probative Value

The Respondent's next major defense (made up of numerous objections or motions), in effect, is that the evidence in the record presented by the I.G. is insufficient, unreliable or otherwise not probative of the issues of liability and aggravating circumstances. The Respondent also argues that the I.G. improperly characterized and interpreted the evidence.

In general, the Regulations provide that all relevant evidence is allowed into the record in this case with certain stipulations designed to ensure fairness. Section 1003.118 of the Regulations provide that: (a) written direct testimony may be used at the hearing in the discretion of the ALJ, and witnesses must be available at the hearing for cross-examination by all parties, §1003.118(a); (b) stipulations of fact may be used, §1003.118(b); (c) (although technical rules of evidence do not apply) the ALJ must apply rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination, when necessary, §1003.118(c).

The Respondent argues that most of the I.G.'s evidence is unreliable hearsay not subject to cross-examination. The Respondent argues that the I.G.'s use of unsworn hearsay statements by beneficiaries to establish liability is unfair because these statements are unreliable, uncorroborated, and not authenticated. The Respondent requests that such statements be given no probative value and that the claims to which they relate be dismissed. As stated earlier in this Discussion, hearsay is admissible in this proceeding as long as it is credible, trustworthy, reliable and used in a fair manner. See, 5 U.S.C. §556(d); Catholic Medical Center v. NLRB, 589 F. 2d 1166 (2d Cir. 1978); National Labor Relations Board v. McLure Associates, Inc., 556 F. 2d 725 (4th Cir. 1975); DAVIS, supra at §§16.4 16.5, 16.6, 16.7, and 16.8. Generally, with regard to the admission of written statements of persons in lieu of testimony, the dispositive case is Richardson v. Perales, supra, which holds that where a respondent fails to attempt to confront a witness, the witness' statement may be, substantial evidence, even though it is hearsay.

For the reasons stated earlier in this Discussion, the Respondent's arguments about the I.G.'s submission and use of the hearsay statements of beneficiaries (Respondent's clients) have no merit. More importantly, in asserting these objections and defenses concerning the use of hearsay, the Respondent completely ignores or misses the main thrust of the I.G.'s case concerning liability, which rests firmly upon the non-hearsay testimony of two

California Medi-Cal Fraud investigators and the Respondent's own records. The majority of the records in evidence which are relied upon by the I.G. are business records. These records, the Respondent's billing account records and patient files (discussed in detail earlier), fall within the business records exception to the hearsay rule found at Rule 803 (6), (7), of the Federal Rules of Evidence. These records are also admissions because they were used by the Respondent and kept by him in the ordinary course of business. Mario Piazza, one of the Medi-Cal Fraud Unit investigators, testified that the Respondent and Gail Hartman identified these records as the Respondent's business records.

For the reasons stated above, I find these records to be trustworthy and reliable. See Calhoun v. Bailor, 626 F. 2d 145, 148 (9th Cir. 1980), cert. den, 452 U.S. 906 (1981). Finally, the Respondent made no attempt to controvert his own business records. He could have testified or called Gail Hartman to testify. Also, With regard to the hearsay statements of the beneficiaries, Mario Piazza's testimony is helpful and the other beneficiaries' statements are corroborated by the Respondent's business records. TR IV/139 to 142; 157 to 158, see also I.G. Ex 6A, 6D, 13A/1, 13, 43.

VII. The Amount of the Proposed Penalties and Assessments (as Modified) are Reasonable and Appropriate Under the Circumstances of this Case.

Since I found and concluded that the Respondent is liable for penalties and assessments (because the I.G. proved liability by a preponderance of the evidence) I must decide the appropriateness of the proposed penalties and assessments, as modified by the evidence in the record. 32/

A. Aggravating Factors

The Act and Regulations provide that, in determining the amount or scope of any penalty or assessment, the Secretary shall take into account: (1) the nature of the claims and the circumstances under which false claims were presented; (2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims; and (3) such other matters as justice may require. See, Regulations §1003.106. The Regulations require me to balance any aggravating factors against any

32/ The Respondent's argument that the penalties are disproportionate to the offense committed by the Respondent is unsupported. Moreover, §1003.115(c) of the Regulations states that the A.L.J. "does not have authority to decide upon the validity of Federal statutes or regulations."

mitigating factors. The Regulations provide that, where there are substantial aggravating circumstances, the amount of each penalty and assessment be set near or at the maximum amount. Finally, §101.106(b)(4) provides that Respondent's resources will be considered.

I conclude that there exist these aggravating factors:

1. Dr. Scott obtained MEDI stickers from clients in excess of those needed to claim reimbursement for the psychotherapy services he allegedly gave clients during their office visits.

2. Dr. Scott obtained MEDI stickers from clients for months when those clients did not have office visits.

3. Dr. Scott obtained MEDI stickers from clients assigned by Medi-Cal to other beneficiaries.

4. Dr. Scott sold vitamins to clients in exchange for MEDI stickers which he later affixed to claims, even though he knew that Medi-Cal did not reimburse providers for vitamin sales; he falsely claimed that he had provided psychotherapy services.

5. Dr. Scott claimed psychoterapy services to Medi-Cal beneficiaries who were not his clients (when he knew he never had an office visit with them).

6. Dr. Scott claimed psychotherapy services in sessions lasting an hour and a half each, and wrote special letters justifying the length of the sessions in instances where the beneficiary-subject of the claim was not his client and never had an office visit with him.

7. Dr. Scott submitted false claims, for which he is liable under the CMPL and Regulations, for a substantial period of time (approximately nine months) and accepted MEDI stickers in exchange for vitamins for an even longer period.

8. In a letter sent to Danny Brock (I.G. Ex 42), the Respondent wrote a note (TR VI/178-82) clearly stating the MEDI stickers were being accepted in payment for vitamins. I.G. Ex 42/2 7A/3.

9. Dan Beall (A.K.A. Danny Brock) testified that during his visit to the Respondent's office, the Respondent told him that (Beall) needed certain vitamins. TR VI/142-43. When Mr. Beall said he had only $5.00, Dr. Scott responded:

> Well, you still have two stickers. You didn't come earlier this month; the sticker will pretty much cover the cost of these two vitamins I want to give you. They are about equal to what an office visit would cost. So I will give you the vitamins and take a Medi-Cal sticker for that, and then I will just take a Medi-Cal sticker for this visit. TR VI/142-43.

B. Mitigating Factors

The only mitigating factor which I found is that even though Dr. Scott is liable under the CMPL and Regulations for a false claim of "psychotherapy" services to Sharone Negev on December 30, 1981, he did give her an office visit on December 16, 1981, for which he apparently did not file a claim.

The Respondent argued that Dr. Scott's financial condition should be taken into account as a mitigating circumstance, citing the testimony of Dr. Scott's accountant that Dr. Scott would have to "close shop" and move into an apartment to pay the then proposed penalties and assessments of $84,000. TR VIII/23. The financial information on which the accountant based his opinion was not audited, but was supplied by Dr. Scott. A hand written "balance sheet" submitted by the Respondent showed a "net worth" of $101,797, consisting largely of the Respondent's equity in various real estate properties. R Ex G. 33/

I do not think that the "financial condition" portrayed by the Respondent's accountant is a basis for mitigating the $76,000 penalties and assessments which I am imposing in this case. The basis for the financial statement is neither objective nor reliable. For example, in the unaudited statement purporting to show Dr. Scott's assets as of December 31, 1985, the real estate in Willits, California, is shown to be worth $104,000. R Ex G; see, also, attachment to Respondent's brief of September 22, 1986. In an application for a real estate mortgage loan dated September 14, 1985, the Respondent declared the "present market value" of the Willits property to be $140,000. I.G. Ex 48. There are other discrepancies. Apparently, the Respondent uses greatly different estimates of his assets, depending on his purpose. Thus, the Respondent did not produce any reliable evidence of his alleged financial condition, much less establish by a preponderance of the evidence that he could not pay penalties and assessments of $76,000.

33/ I kept the record of the record of the hearing open for two weeks in May 1986 to permit the Respondent time to furnish a final financial report. When the Respondent finally offered the Report, three months later, his "net worth" was shown as $91, 244. I did not accept the delinquent report as evidence, but I allowed the Respondent to attach it to his September 22, 1986 brief on mitigating circumstances. See my Order of September 2,1986.

The Respondent also submitted a number of letters from clients. R Ex F. Most of them are addressed to the lawyer who represented Dr. Scott in the State criminal false claims case and apparently were written in March 1983 (judging by their dates), around the time that Dr. Scott entered his plea of no contest in that case. The tone of the letters is that these clients, including one of the Medi-Cal beneficiaries involved in this case, were satisfied with the treatment which they received from Dr. Scott.

These letters might have been useful, and perhaps even mitigating, if the issue here had been whether Dr. Scott rendered services which were popular with his clients. The issue in the 71 claims here is whether Dr. Scott rendered <u>any</u> service to the named client on the date, as claimed. His culpability is not lessened because on other occasions or with other clients he rendered pleasing, even useful services.

C. The Penalties and Assessments (As Modified) are Supported by the Record

The total amount of penalties and assessments that could be imposed are much greater than what I am imposing. The penalties are intended to serve as a deterrent to future unlawful conduct by a particular respondent or by other participants in the Medicare or Medicaid programs. In its report on the CMPL, the House Ways and Means committee found that "civil money penalty proceedings are necessary for the effective prevention of abuses in the Medicare and Medicaid program. . . ." H.R. Rep. No. 97-158, 96th Cong., 1st Sess. Vol. III, 327, 329 (1981). I conclude that penalties of $76,700 are a sufficient deterrent, based on the proof in the record.

The purpose of assessments in CMPL cases is to enable the United States to recover the damages resulting from false claims; this includes the reimbursement actually paid to a respondent and the costs of investigating and prosecuting the unlawful conduct. The assessments are "in lieu of damages." The assessments enable the United States to recoup damages without having to assume the burden of establishing actual damages. 48 Fed. Reg. 38831 (Aug. 26, 1983). I conclude that assessments of $3,800 are appropriate in this case.

ORDER

Based on the evidence in the record and the CMPL and Regulations, it is hereby Ordered that the Respondent:

(1) pay penalties $76,700 and

(2) pay an assessments of $3,800,

(3) be given a $4,500 credit for restitution already paid to Medi-Cal, leaving a combined total of $76,000.

/s/

Charles E. Stratton
Administrative law Judge