

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Universal Respiratory Care, LLC  
(Supplier No: 4879950001)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-78

Decision No. CR2106

Date: April 6, 2010

**DECISION**

The Centers for Medicare & Medicaid Services (CMS) revoked Petitioner's Medicare supplier number, after the supplier's employee created and sent to the Medicare contractor a phony letter, purportedly from the Maryland state licensing agency, falsely claiming that the supplier's license was current.

Petitioner, Universal Respiratory Care, LLC., appeals the revocation, and CMS moves for summary judgment. As discussed below, the uncontroverted facts compel revocation of Petitioner's supplier number. I therefore grant CMS's motion for summary judgment.

**I. Background**

Until its Medicare supplier number was revoked on May 28, 2009, Petitioner participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). *See* 42 C.F.R. § 424.57. In a letter, dated April 28, 2009, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse, notified Petitioner that its supplier number would be revoked, and that, pursuant to 42 C.F.R.

§ 424.535(c), the supplier would be barred from re-enrolling in the Medicare program for one year. The letter gave two reasons for the revocation: 1) the supplier did not have a current Residential Service Agency (RSA) license; and 2) the supplier's administrator submitted to the contractor false documentation regarding renewal of the license. CMS Ex. 7.

Petitioner sought reconsideration. In a reconsideration decision, dated August 25, 2009, a Medicare hearing officer found that the supplier had submitted false documentation, which justified revoking Petitioner's supplier number. CMS Ex. 11. Petitioner now appeals that determination.

CMS moves for summary judgment. With its motion and brief, CMS submits 12 exhibits (CMS Exs. 1-12). Petitioner submits a response, with no additional exhibits.

## II. Discussion

*CMS is entitled to summary judgment, because the undisputed evidence establishes that the supplier, Universal Respiratory Care, LLC, did not satisfy Medicare enrollment requirements.<sup>1</sup>*

Summary judgment. The Departmental Appeals Board has, on multiple occasions, discussed the well-settled principles governing summary judgment. *See, e.g., 1866ICPayday.com, L.L.C.*, DAB No. 2289 at 2-3 (2009). Summary judgment is appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *1866ICPayday*, DAB No. 2289 at 2; *Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009), and cases cited therein.

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Ctr. v. Dep't of Health & Human Servs.*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing and Rehab. Ctr.*, DAB No. 1918 (2004).

To defeat an adequately supported summary judgment motion, the non-moving party **may not rely on the denials in**

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<sup>1</sup> I make this one finding of fact/conclusion of law.

**its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact. . . .**

*Illinois Knights Templar*, DAB No. 2274 at 4 (emphasis in original); *Livingston Care Ctr.*, DAB No. 1871 at 5 (2003).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *1866ICPayday, L.L.C.*, DAB No. 2289 at 3; *Brightview Care Ctr.*, DAB No. 2132 at 2, 9 (2007); *Livingston Care Ctr.*, 388 F.3d at 172; *Guardian Health Care Ctr.*, DAB No. 1943 at 8 (2004); *but see Brightview*, DAB No. 2132 at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Moreover, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cf. Guardian Health Care Ctr.*, DAB No. 1943 at 11 (2004) ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

Requirements for a DMEPOS supplier's Medicare participation. To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a supplier of medical equipment and supplies must have a supplier number issued by the Secretary of the Department of Health and Human Services. Social Security Act § 1834(j)(1)(A).

To obtain and retain its supplier number, a Medicare supplier must meet the standards set forth in 42 C.F.R. § 424.57(c), and CMS may revoke its billing privileges if it fails to do so. 42 C.F.R. §§ 424.57(c)(1) and (d); 42 C.F.R. § 424.535(a)(1). Among other requirements, the supplier must truthfully certify that it "[h]as not made, or caused to be made, any false statement or misrepresentation of a material fact on its application for billing privileges." The supplier must also provide "complete and accurate information in response to questions on its application for billing privileges." 42 C.F.R. § 424.57(c)(2).

Undisputed facts and application of law to those facts. Here, the critical facts are not in dispute. On December 1, 2008, Petitioner relocated its business to 110 West Road, Towson, Maryland. CMS Ex. 1 at 16; P. Br. at 2. On December 31, 2008, a supplier employee hand delivered to the appropriate state agency the supplier's check for renewal of its RSA license. CMS Ex. 1 at 3; P. Response at 2.

Thereafter, on February 6, 2009, the supplier submitted to the Medicare contractor a new Medicare enrollment application form (CMS Form 855S) reflecting the location change. CMS Ex. 1 at 4-37. The form specifies that "[a] change to the business location address requires submission of professional and business licenses for the new address. . . ." CMS

Ex. 1 at 16. However, the state licensing agency had not yet issued the necessary RSA license. Fearful that the state licensing procedure would not be completed for months and knowing that, without a Medicare number, the supplier would be out of business, the supplier's employee, Nicole J.B. Parker, forged a letter, using state agency letterhead. The phony letter was addressed to the attention of Ms. Parker at Universal Respiratory Care, LLC. It said that the supplier's RSA license "is considered current" and that the supplier was authorized to operate under state law. CMS Ex. 3.

Petitioner does not dispute any of this but argues that Ms. Parker acted without the owner's knowledge or consent. Petitioner claims that Ms. Parker was not an "authorized official" or a "delegated official," but merely a "contact person." While the supplier's owner/president, Steven T. Baker, delegated to Ms. Parker "the process of licensing around the move," he remained the supplier's sole "authorized official." CMS Ex. 1 at 26, 31. In Petitioner's view, because Mr. Baker did "not permit or direct her to falsify information," the supplier should not be accountable for her actions. P. Br. at 2-3. I disagree.

It is well-settled that an employer is legally responsible for an employee's actions that are committed within the scope of her employment. *See, e.g., U.S. v. Park*, 421 U.S. 658 (1975); *U.S. v. Cabrera-Diaz*, 106 F. Supp. 2d 234 (D.P.R. 2000) (employees' knowledge of the submission of a false claim is imputed to the employer, even absent actual knowledge); *see also Brightview Care Ctr.*, DAB No. 2132 at 13 (2007); *Cherrywood Nursing & Living Ctr.*, DAB No. 1845 at 10 (2002); *Emerald Oaks*, DAB No. 1800 at 7 n.3 (2001); *Florence Park Care Ctr.*, DAB No. 1931 at 18-19 (provider is responsible for the acts of its employees). Here, Petitioner concedes that Ms. Parker was authorized to communicate with the Medicare contractor on issues relating to the supplier's license. Its enrollment application, which was signed by Mr. Baker, explicitly directs the Medicare contractor to contact her if questions arise during the processing of the application. She was therefore acting within the scope of her authority, and the supplier is accountable for her actions.

Based on these facts, I find that Petitioner was not in compliance with all of the standards set forth in section 424.57(c). The employee charged with responding to the Medicare contractor's questions regarding its application for billing privileges made false statements and misrepresentations of material facts, violating 42 C.F.R. § 424.57(c)(2). CMS therefore properly revoked its billing privileges. 42 C.F.R. § 424.57(d).

