DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Grant Appeals Board

Civil Money Penalties Hearing Unit

In the Matter of:	
Harold Chapman and Autumn Manor, Inc., Respondents	DATE: **March 8, 1985** Docket No. C-5 **Decision CR # 1**

DECISION AND ORDER

This is a civil money penalties and assessments case arising from a determination by the Inspector General of the Department of Health and Human Services that the respondents submitted false Medicaid claims for payment.

By letter dated June 1, 1984, the Deputy Inspector General for Civil Fraud notified Harold Chapman and Autumn Manor, Inc., respondents, of the Inspector General's (IG's) intent to impose civil money penalties of $38,000 and an assessment of $118,136 (total:$156,136) pursuant to § 1128 A of the Social Security Act (42 U.S.C. 1320a-7a) as implemented by 45 CFR Part 101. More specifically, the IG's notice of intent was based on a determination by the IG that respondents presented or caused to be presented to the Kansas Department of Social and Rehabilitation Services (Kansas, SRS), a State agency administering the State plan for medical assistance under Title XIX of the Social Security Act (Medicaid), claims for items or services which respondents knew or had reason to know were not provided as claimed. The Inspector IG General charged that on or about August 5, 1982, respondents submitted four cost reports (described below in Findings), one for each of four nursing homes owned by respondents, which contained 19 line item entries that included costs for items and services during the period July 1, 1981 through June 30, 1982 that were not provided as claimed.

Under the Medicaid program, the federal government provides financial assistance to participating States to aid them in furnishing health care to needy persons. States are not required to participate in Medicaid, but if a State chooses to participate, it must have a State plan approved by the Secretary of the Department of Health and Human Services (the

Department, HHS). The State plan must provide for the designation of a single State agency to administer the Medicaid program. In Kansas, the SRS is the single State agency for Medicaid.

Under 42 U.S.C. 1320a - 7a and its implementing regulation, 45 CFR Part 101, the Department may impose civil money penalties and assessments against any person who presents or causes to be presented a claim for an item or service under the Medicaid program that the person knew or had reason to know was not provided as claimed, i.e., a false claim. The Department may impose a penalty of up to $2,000 for each item or service falsely claimed and an assessment of up to twice the amount claimed for each item or service. In addition, a person subject to a penalty or assessment may be suspended by HHS from participation in the Medicaid and Medicare programs.

By letter dated June 28, 1984, counsel for respondents requested a hearing before an Administrative Law Judge as provided for in 45 CFR Part 101.

On October 15, 1984, the undersigned conducted a hearing in Kansas City, Missouri, at which the parties were given the opportunity to present material evidence relevant to the issues, to present and cross-examine witnesses, to make opening statements, and to present oral argument. Following the hearing, after receipt of the hearing transcript, the parties were given the opportunity to submit written briefs, proposed findings of fact, and proposed conclusions of law.

Harold Chapman was tried by the State of Kansas and found guilty in October 1983 of unlawfully, feloniously, willfully and with intent to defraud making or causing to be made the aforesaid four cost reports with knowledge that they falsely stated some material matter or were not what they purported to be. Mr. Chapman did not appeal his conviction. Pursuant to 45 CFR 101.114(c), where a final determination that the respondent presented or caused to be presented a claim and/or request for payment falling within the scope of 45 CFR 101.102 has been rendered in any proceeding in which the respondent was a party and had an opportunity to be heard, the respondent shall be bound by such determination in any proceeding under 45 CFR Part 101.

Issues

1. At a prehearing conference in this case, the parties agreed that the principal issue was whether the proposed penalties and assessment were appropriate. This included consideration of what, if any, aggravating or mitigating circumstances there were and what affect these circumstances had on the proposed penalties and assessment. My decision is to accept the penalties and assessment proposed by the Inspector General.

2. At the hearing and in the posthearing briefs the parties also raised these other issues:

a. Whether the assessment should have been limited to the $21,115.62 overpayment induced by the false claims. My decision is that here the assessment is not limited to the amount of the overpayment.

b. Whether any assessment should be made where the amount of the overpayment was offset by a greater amount underpaid to a fifth nursing home owned by respondents. My decision is that an assessment may be made here even though the overpayment was offset by an underpayment.

c. Whether the cost reports containing the 19 line items were claims for payment within the meaning of 42 U.S.C. 1320a - 7a(h) and 45 CFR Part 101. My decision is that the cost reports were claims for payment within the meaning of the regulation.

d. Whether the line items for lawn care were items or services which were not provided as claimed. My decision is that the item lawn care was not provided as claimed.

3. The Inspector General also generally briefed the issue of whether the 19 line items were falsely claimed as alleged. Except as indicated in the issues described above, the respondents did not address this issue. Accordingly, it is not discussed generally in this decision.

Findings of Fact and Conclusions of Law

Having considered the entire record, the arguments of the parties, and being advised fully herein, I make the following findings of fact and conclusions of law:

A. Each of the 19 line items is an item or service subject to a determination under 45 CFR 101.102.

1. During the period July 1, 1981 through June 30, 1982, and at all other times relevant to this proceeding, Harold Chapman was the president and principal stockholder of Autumn Manor, Inc., a corporation organized under the laws of the State of Kansas.

2. During the period July 1, 1981 through June 30, 1982, and at all other times relevant to this proceeding, until December 9, 1983, Autumn Manor, Inc. owned and operated five nursing homes in the State of Kansas, including Autumn Manor No. 1 (Yates Center) Autumn Manor No. 2 (Yates Center), Autumn

Manor No. 3 (Florence), and Autumn Manor No. 4 (Chanute). Autumn Manor No. 5 (Lawrence) was not directly involved in this proceeding.

3. On July 29, 1982, Harold Chapman signed four cost reports, one each for Autumn Manor No. 1, Autumn Manor No. 2, Autumn Manor No. 3, and Autumn Manor No. 4, for the period July 1, 1981 through June 30, 1982. The cost reports were titled Financial and Statistical Report for Adult Care Homes and were executed on Form No. MS-2004 of the Kansas Department of Social and Rehabilitation Services.

4. Harold Chapman caused the four cost reports listed in No. 3 above to be filed with the Kansas Department of Social and Rehabilitation Services, which received them on or about August 5, 1982.

5. The four cost reports referred to in Nos. 3 and 4 above contained entries which included the following amounts:

a. Autumn Manor No. 1

(1) Housekeeping Supplies	$ 5,190
(2) Nursing Supplies	5,000
(3) Food	14,944
(4) Linens	3,000
(5) Lawn Care	2,100
Subtotal	$30,234

b. Autumn Manor No. 2

(1) Housekeeping Supplies	$ 5,126
(2) Nursing Supplies	5,323
(3) Food	15,942
(4) Lawn Care	3,100
Subtotal	$29,491

c. Autumn Manor No. 3

(1) Housekeeping Supplies	$ 4,931
(2) Nursing Supplies	5,562
(3) Food	17,482
(4) Linens	4,000
Subtotal	$31,975

d. Autumn Manor No. 4

(1) Housekeeping Supplies	$ 3,940
(2) Nursing Supplies	6,114
(3) Food	9,082
(4) Dietary Supplies	2,000
(5) Linens	3,500
(6) Lawn Care	1,800
Subtotal	$26,436

e. The items or services listed above, totalling $118,136, were the same 19 line items as set forth in the Inspector General's notice letter of June 1, 1984.

6. None of the items or services listed in 5.a. - 5.d. above were provided as claimed.

7. The rates of reimbursement which the Kansas Department of Social and Rehabilitation Services paid out of State and federal funds to Autumn Manor, Inc., for Medicaid recipients provided with care and services at Autumn Manor Nos. 1, 2, 3, and 4, during the period July 1, 1981 through June 30, 1982, were based on the information contained in the aforesaid cost reports, including the amounts described in 5.a. - 5.d. above.

8. As a result of the inclusion in the aforesaid cost reports of the items or services described in 5.a. - 5.d. above, totalling $118,136, which Autumn Manor, Inc., did not provide as claimed, the Kansas Department of Social and Rehabilitation Services paid Autumn Manor, Inc. $21,115.62 more than the amount to which it was entitled for care and services to Medicaid recipients at Autumn Manor Nos. 1, 2, 3, and 4 during the period September 1, 1982 through November 30, 1982.

9. On May 19, 1983, Harold Chapman was charged by the State of Kansas with four counts of making a false writing, one count each for Autumn Manor Nos. 1, 2, 3, and 4.

10. At Mr. Chapman's trial on the charges described in No. 9, above, the jury was instructed, in effect, that to find Harold Chapman guilty of the charge of

making a false writing, the jury had to be convinced beyond a reasonable doubt:

a. That Harold Chapman caused to be made false written instruments, specifically Financial and Statistical Reports for Adult Care Homes -- Form No. MS-2004.

b. That Harold Chapman knew that such financial and statistical reports falsely stated or represented some material matter.

c. That Harold Chapman intended to defraud based on such financial and statistical reports. Intent to defraud was defined in the jury instructions as an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.

d. That the crime with which Harold Chapman was charged occurred on July 29, 1982.

e. That Harold Chapman's conduct was intentional. The jury instructions defined intentional as meaning willful and purposeful and not accidental. The jury was instructed that intent, or lack of intent, was to be determined or inferred from all of the evidence in the case.

11. The jury at Harold Chapman's state criminal trial was also instructed that it was a defense if by reason of ignorance or mistake Harold Chapman did not have knowledge that the aforesaid financial and statistical reports which were submitted to the Kansas Department of Social and Rehabilitation Services contained information which was false. The instructions noted that Harold Chapman claimed as a defense that he lacked knowledge of the specific contents of the financial and statistical reports. The jury was instructed that the State, not Harold Chapman, had the burden of proving Harold Chapman's guilt and that the jury should find Harold Chapman not guilty if the asserted defense caused the jury to have a reasonable doubt as to Harold Chapman's guilt.

12. On October 7, 1983, the jury found Harold Chapman guilty on all four counts. The District Court of Shawnee County, the trial court, fined Mr. Chapman $20,000 ($5,000 on each of the four counts) and ordered that he pay court costs and also additional court costs in the form of expenses incurred by the

State for witness fees. The Court suspended imposition of a sentence of imprisonment and placed Mr. Chapman on probation with the condition, among others, that he divest himself of operation of the nursing homes. The fines and costs were paid by checks drawn on Autumn Manor, Inc. in January 1984.

13. The Inspector General did not dispute that neither Harold Chapman or Autumn Manor, Inc. was any longer engaged in the ownership or operation of nursing homes.

B. With respect to mitigating and aggravating circumstances:

1. The parties agreed that determination of the appropriateness of the penalty and assessment is governed by 45 CFR 101.106.

2. 45 CFR 101.114(d) states that the respondent shall bear the burden of producing and proving by a preponderance of the evidence any circumstances described in §101.106 that would justify reducing the amount of the penalty or assessment.

With these to guide me, and upon consideration of the evidence submitted and the arguments of the parties as described in more detail in the Discussion below, I find as follows:

3. It is an aggravating circumstance that respondents submitted false claims totalling $118,136.

4. It is an aggravating circumstance with respect to each and every item or service that the respondents not only knew that the claims were false but also that those claims would induce the State agency to pay per diem rates in excess of the rates to which respondents were entitled.

5. Evidence presented at Harold Chapman's State trial showed that he caused to be made false invoices in the names of various vendors covering the false amounts in each of the 19 line items which are the subject of this proceeding. As a result of these false invoices checks were issued by agents or employees of respondents but were left unsigned. Mr. Chapman told the State auditors in the Fall of 1982 that he planned to sign and send the checks to the vendors shortly after January 1, 1983, but the checks were never sent. It is an aggravating circumstance with respect to each of the 19 line items that respondents not only falsely claimed the item or service but also attempted to conceal their fraud with these other deceptions.

6. It is not a mitigating circumstance that:

   a. The cost reports were prepared by agents or employees of the respondents.

   b. The cost reports were prepared, signed, and submitted to the State agency as a single stream of events, a continuous act.

   c. The cost reports were all of the same type.

   d. The cost reports were submitted simultaneously.

   e. The 19 line items represented only six vendors and three types of things (food, paper goods, and lawn mowing equipment).

   f. Respondents did not appeal an administrative determination by SRS that the false claims should be disallowed.

   g. It was not disputed that respondents were underpaid for services to Medicaid recipients in a fifth nursing home owned by respondents in an amount greater than the overpayments to the other four resulting from the false claims.

   h. Respondents' income is derived from past, rather than present, employment.

   i. Harold Chapman was fined $20,000 by the State court and ordered to divest himself of his nursing homes.

7. It is not an aggravating circumstance that Harold Chapman made basically the same defense at the hearing in this case that he had at his State trial.

Discussion

1) The nature and circumstances of the claims and the circumstances under which they were presented are more of an aggravating than a mitigating circumstance.

Respondents contended that certain circumstances surrounding the preparation and submission of the cost reports were mitigating circumstances (see Findings B.6b--6e, supra.). Under the guidelines set forth in 45 CFR 101.106(b)(1), it would be a mitigating circumstance if all of the items or services were the same type and occurred within a short period of time, there were few such items or services, and the total amount claimed for the items or services was less than $1000.

Here, the total claimed, $118,136, was not insubstantial and the number of items (19) was more than a few. Respondents did not explain why the number of vendors or the number of types of items (where they were admittedly not all the same) should be mitigating circumstances, and I am not persuaded that they are. Similarly, respondents did not explain why the fact that the cost reports were prepared by their agents and that the preparation, signing, and submission were a continuous act should be, and I did not find them to be, mitigating circumstances. The simultaneous or one-time submission of the cost reports was not a mitigating circumstance because those reports were the basis of daily rates of reimbursement which were intended to be used for the succeeding 12 months.

The Inspector General argued that not only the magnitude of the claim ($118,136) but also the fraudulent circumstances under which the claim was made should be considered aggravating. The guidelines do make it an aggravating circumstance if the amount claimed was substantial. In this case, $118,136 is substantial.

The guidelines do not list fraudulent conduct under nature and circumstances. Although the guidelines are not binding, I followed them here but considered the respondents' fraudulent conduct under the degree of culpability, discussed infra.

2. The degree of culpability was an aggravating factor.

Respondents pointed out that they did not appeal an administrative determination by the State agency that the 19 line items involved here should be disallowed; 1/ that a fifth nursing home then owned by respondents was underpaid for the same period at issue here in an amount greater than the overpayments disallowed the other four; 2/ and that as a result the State agency was able to recoup the overpayments immediately. Respondent concluded that Harold Chapman's "knowing waiver of his right to appeal" the disallowance was a prompt corrective step and, as such, a mitigating circumstance.

1/ The State agency audited respondents and as a result of that audit disallowed $118,136 in costs that had not been incurred and lowered that daily rates paid to respondents for the four nursing homes, starting December 1, 1982.

2/ The fifth nursing home was in its first year of operation by respondents and was underpaid on a prospective daily rate.

The guidelines state that it should be considered a mitigating circumstance if (1) the claim for an item or service was the result of an unintentional and unrecognized error in the process respondent followed in presenting claims and (2) corrective steps were taken promptly after the error was discovered. 45 CFR 10.106(b)(2).

Far from meeting this standard, respondents' actions here were aggravating, not mitigating. The guidelines state that it should be considered an aggravating circumstance if the respondents knew the item or service was not provided as claimed. Thus, the culpability of the respondents was an aggravating factor.

The State court trial jury found that Harold Chapman submitted cost reports which he knew had not been provided as claimed. In the present proceeding, the respondents were precluded by Mr. Chapman's conviction from contesting the jury findings on the cost reports, but respondents could have contested the falsity of any of the 19 line items. They did not. 3/ Respondents knew that each item or service was not provided as claimed and their culpability as to each was an aggravating circumstance.

I also am not persuaded that respondents acted promptly to correct their deliberate "error." The failure to appeal may have been an admission of error, as Mr. Chapman indicated in his testimony, but it was not a "correction." There is ample evidence in the trial testimony and exhibits that the "corrective" action that Mr. Chapman took when he became aware that he would be audited by the State agency and thus the "error" would be discovered was to issue false invoices to cover the "error" and to purport to pay these false invoices by check. 4/

3/ Harold Chapman did testify, as he had at his trial, that the item "lawn care" was actually to cover the purchase of a garden tractor which he acquired in March 1983. Despite this testimony, I found that the respondents knew all 19 line items were false claims. For a discussion of the lawn care item, see pp. 15-16, infra.

4/ Shortly before the State audit, Mr. Chapman instructed his employees to prepare the false invoices, using letterhead bearing the supplier's names as though the suppliers had issued the invoices. The suppliers had not issued these invoices. Mr. Chapman offered the explanation that these invoices were "projections." Tr. 58, 62. The false invoices led the bookkeeper to issue checks, which Mr. Chapman did not send but kept, unsigned. Tr. 67.

Thus, respondents' efforts at "correction" as to each of the 19 items were aggravating, not mitigating, circumstances.

3. The respondents' lack of prior offenses was not a mitigating circumstance.

Both parties agree that respondents had not been held liable for criminal, civil, or administrative sanctions in connection with a program of reimbursement for medical services prior to the submission of the false claims at issue here. Respondents argue that the lack of prior offenses was a mitigating factor. The guidelines provide that such prior offenses are an aggravating circumstance, but do not suggest that the lack of prior offenses should be mitigating. I am not persuaded that respondents' penalty and assessment should be mitigated solely because there were no prior offenses.

4. The respondents' financial condition was not a mitigating circumstance.

The guidelines state that the resources available to the respondent will be considered when determining the amount of the penalty and assessment. 5/

Respondents conceded in their brief that their income, derived from the sale of the nursing homes, was "significant." At the hearing, Harold Chapman estimated the net worth of Autumn Manor, Inc., to be almost $2 million and counsel for respondents acknowledged that they were financially able to respond. Tr. 149, 116. Despite those concessions, respondents argue in mitigation that all of their income is the fruit of many years of "past and unstinting labors" and not derived from present employment.

In addressing another point, respondents noted that they had been in the business of operating nursing homes for twelve years. During that time Harold Chapman's labors yielded a

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5/ The guidelines also state that it should be a mitigating circumstance if the amount of the penalty or assessment without reduction would jeopardize the ability of the respondent to continue as a health care provider. Respondents have divested themselves of their nursing homes and state in their brief that Harold Chapman will never be able to resume operation of any health care facility "for reasons of age, health, legal and other disability, and spirit." Thus, this factor was not considered. The Inspector General conceded that financial condition may be a mitigating circumstance even where a respondent's ability to continue as a provider is not at issue.

net worth of approximately $2 million (for Autumn Manor Inc. alone). It does not seem inappropriate that respondents' penalty and assessment ($156,318) should be approximately eight percent of that net worth. The false claims were part of the cost reports for one year. A ratio of one year to 12 is approximately eight percent (8.3%).

5. There are no other circumstances of an aggravating or mitigating nature which need be taken into account to assure the achievement of the purposes of the civil money penalties regulations.

Under this factor, respondent noted that Harold Chapman had paid a $20,000 fine and had divested himself of all of his nursing homes as a result of his State court conviction. Although the fine was the maximum allowed by State law, it was not a large enough amount be be a mitigating circumstance. The sale of the nursing homes was not in and of itself a mitigating factor; the economic effect on the respondents was an aspect of their financial condition, discussed above.

The Inspector General contended that it was an aggravating circumstance that Mr. Chapman, in exercising his right to a hearing, used that forum to reiterate explanations of his conduct which he had given at his trial. The Inspector General saw this as a failure of Mr. Chapman to recognize any wrongdoing on his part, or to have remorse for it. Indeed, Mr. Chapman's version of what occurred was not any more credible to me than it was to the State court jury. However, I believe it is more appropriate to consider the expense of what may have been an unnecessary or misdirected administrative proceeding resulting from Mr. Chapman's intransigence on this matter as a factor in measuring the assessment in lieu of damages. See the discussion below on this point.

6. The aggregate penalty and assessment of $156,136 is reasonable in this case.

There are both maximum and minimum levels for the aggregate amount of the penalty and assessment. The maximum in this case is a penalty of $38,000 and assessment of $236,272, for an aggregate of $274,272. 45 CFR 101.103, 101.104. The minimum is double the approximate amount of damages sustained unless there are extraordinary mitigating circumstances by the State agency, or $42,231.24.

The guidelines state that if there are substantial or several mitigating circumstances, the amount of the penalty and assessment should be set sufficiently below the maximum to reflect that; and if there are substantial or several aggravating circumstances, the aggregate amount of the penalty and assessment should be set at an amount sufficiently close to the maximum to reflect that. As discussed in detail above,

there are few mitigating circumstances and several aggravating circumstances. For those reasons, I conclude that it is reasonable to set the aggregate amount of the penalty and assessment at $156,136, which is approximately 57 percent of the maximum ($274,272). 6/ As requested by the Inspector General and as permitted by the regulation, this amount is imposed against each of the respondents. The allocation of that total between the respondents is left to the discretion of the United States, but the total amount collected may not exceed $156,136.

7. An assessment is not limited to damages, nor is it inappropriate because damages were recouped immediately.

Respondents contended in their brief that an assessment here was not warranted because 1) damages were limited to $21,115.62 and were recouped immediately in an offset. The civil money penalties regulation states that an assessment is in lieu of damages sustained by the United States and the State because of the false claim. 45 CFR 101.104. Both parties agree that the State suffered damages here of $21,115.62, the amount of the overpayment resulting from respondents' false claims. 7/ It was not disputed that the overpayment was offset by an amount which the State agency underpaid a fifth nursing home owned by respondents and thus was recouped immediately by the State.

Although the amount of damages suffered by the State in the form of the overpayment of $21,116 may have been one element in the assessment, it was not the only one. As discussed at some length in the analysis of mitigating and aggravating factors, supra, the aggregate of the penalty and assessment ordinarily should be not less than double the amount of damages and the assessment alone may not be more than double the amount claimed. 45 CFR 101.106, 101.104. The preamble notes that the regulation follows the statute (section 1128A

6/ Respondents argued that there be no assessment (see discussion infra) and that the penalty be lowered to $1,000 per line item. This would have made the total $19,000, or only seven (7) percent of the maximum.

7/ Neither the Inspector General nor the respondent briefed in any detail the issue of whether the assessment was limited specifically to the $21,116 overpayment damages suffered by the State. Nor did the parties brief the more basic issue of what defines the term "damages" in 45 CFR 101.104. Consequently, I do not decide here what that term means.

of the Social Security Act), which has an identical assessment provision:

> In enacting the latter provision, Congress clearly intended to obviate the need for the government to prove the amount of damages in order to make an assessment. Because the costs of investigating the false claim and of pursuing administrative sanctions are not separately recoverable, it is reasonable for Congress to have concluded that twice the amount claimed for such items or services would fully compensate the government for all losses incurred as a result of the claim.

48 Fed. Reg. 38830 (August 26, 1983).

Thus, even if one disregarded the amount of the overpayment, because it had already been recouped, there remained the cost of the investigation by the federal agency, the cost of pursuing administrative sanctions, and the cost of providing a hearing. The Inspector General was not required to account for these costs in defending the assessment, but it is not unreasonable to assume that they exceeded $118,136.

8. The amount falsely claimed is the total of the false items or services on the cost reports.

Respondents argued that the amounts of the false items or services on the cost reports could not be the basis of the assessment under 45 CFR 101.104 because cost reports are not claims. Respondents contended that although the cost reports provided data on which to formulate a rate, the cost reports themselves were not requests for payment. Respondents also asserted that the rate formulated on the basis of the cost reports is paid only upon submission of the monthly listing of the number of patients and the number of days each was in a facility. According to respondents, this listing, called a turn-around sheet, constituted a request for payment, citing the testimony of two state officials from the transcript of Mr. Chapman's trial. Tr. 144-145.

The Inspector General contended that the turn-around sheet did not by itself generate a payment. According to the Inspector General, a turn-around sheet operated as a demand for a sum certain (number of patient days multiplied by the per diem rate) only after the per diem rates had been calculated on the basis of the cost reports.8/ Respondents

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8/ The Inspector General defined the per diem rate as "what it cost [a nursing home] to provide a day of service to a resident during the preceding year adjusted for inflation."

did not use the opportunity of filing a reply brief to rebut this assertion.

I am impressed that the Inspector General's description of the payment scheme is corroborated by Mr. Chapman's testimony at the hearing, under questioning by his own counsel. Tr. 87-88. In fact, Mr. Chapman testified in response to two separate questions that the cost reports created reimbursements, i.e., payments, to him. Id. Mr. Chapman's understanding of the payment scheme was consistent with the testimony of the State officials (later relied on by respondents' counsel during closing arguments), although it was not consistent with or supportive of the position taken by respondents' counsel during closing argument and in the posthearing brief, as noted above.

The civil money penalty regulations define an item or service "in the case of a claim based on costs" as any entry in a cost report. 45 CFR 101.101. A claim is defined as an application for payment of an item or service. Id. Respondents admittedly knew that the false cost reports they submitted were an essential part of the mechanism for claiming reimbursement. Harold Chapman's conviction was based on a finding of intent to defraud -- i.e., to induce the State agency to create an obligation by filing the cost reports. I.G. Ex. 5 (Instructions to Jury). Indeed, if the cost report could not have been used to induce the State to create a payment obligation, the jury should not and likely would not have found Harold Chapman guilty of fraud. Harold Chapman did not appeal his conviction and I am guided, if not bound, by that conviction to the logical conclusion that in this case each of the 19 false items in the cost reports was a "claim" within the meaning of the civil money penalty regulations.

9. The claims for lawn care were false.

The cost reports for three of the four nursing homes contained items for "lawn care" totalling $7,000. Harold Chapman testified that he did not order lawn care, but he did purchase a garden tractor from the same vendor for $7,000. Mr. Chapman also testified that the vendor in question delivered a tractor to respondents in March 1983. Respondents paid a balance of $7,000 on the tractor at the time of delivery. 9/

9/ Both Mr. Chapman and the vendor, who described himself as a friend and business associate, testified that the tractor was ordered in the summer of 1982 (prior to July 29 and probably in June) and at the time of the order respondents delivered to the vendor a trade-in

(continued on next page)

The tractor purchase could not have been the "lawn care" item. The purchase of the tractor was not effected until March 1983. Even if the purchase had occurred prior to July 29, 1982, respondents would not have been entitled to claim the full purchase price in the cost reports for 1982. Mr. Chapman acknowledged that he knew that a tractor was a capital asset and that respondents had to depreciate the cost over the life of the tractor. He also knew that lawn care was not a capital cost and thus the cost of lawn care, unlike a tractor, could be recovered in the year it was incurred. From this I conclude that the items claimed as "lawn care" were not provided at all. They admittedly were not provided as claimed; and respondents knew or had reason to know this at the time the cost reports were submitted.

Conclusions of Law

1. Based on the State court conviction of Harold Chapman, the stipulations agreed to by both parties, and the evidence presented or elicited at the hearing in this case, the Inspector General has proved by a preponderance of the evidence that respondents presented or caused to be presented the 19 claims for payment knowing that the claims were for items or services which had not been provided as claimed.

2. Respondents did not meet their burden of producing and proving by a preponderance of the evidence that there were any circumstances that would justify reducing the amount of the penalties or assessment.

ORDER

The penalty of $38,000 and assessment of $118,136 (total: $156,136) proposed by the Inspector General is approved and the respondents are hereby ordered to pay this amount. Each of the respondents is liable for the entire amount or such part of it as directed by the Inspector General; except that the Inspector General may not collect more than $156,136.

/s/

William E. Zleit
Administrative Law Judge

9/ Cont.
tractor valued at approximately $1800, as part of the purchase price. The order could have been cancelled up to 60 days from the date of delivery.