Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
The Inspector General,	)	DATE: October 10, 1990
	)	
- v. -	)	
	)	Docket No. C-147
Edward J. Petrus, Jr., M.D.,	)	
and The Eye Center of Austin,	)	Decision No. CR103
	)	
Respondents.	)	
	)	

DECISION

Respondents requested a hearing to contest the Inspector General's (I.G.) proposed imposition against them, jointly and severally, of civil monetary penalties and assessments. The I.G. alleged that Respondents violated section 1128A of the Social Security Act (the Act), as implemented by 42 C.F.R. 1003.100 et seq.

I held a hearing in Austin, Texas, on March 19-24, 1990. Based on the law, regulations, and evidence adduced at the hearing of this case, I conclude that Respondents unlawfully presented or caused to be presented 271 claims for items or services that they knew, had reason to know, or should have known were not provided as claimed. I impose penalties of $100,000.00 and assessments of $80,000.00 against Respondents, jointly and severally.

ISSUES

The issues in this case are whether:

1. The six-year statute of limitations provided in section 1128A(c)(1) of the Act applies to the claims for items or services at issue.

2. Assuming the six-year statute of limitations applies, the I.G. initiated a proceeding against Respondents not later than six years after the claims at issue were presented.

3. Rulings on the admissibility of evidence in this case violated Respondents' due process rights.[1]

4. Denial of Respondents' motion to postpone the hearing was unfair to Respondents.

5. Respondents presented or caused to be presented claims for items or services in violation of section 1128A of the Act.

6. Assessments and penalties should be imposed against Respondents and, if so, in what amounts.

7. The penalties and assessment imposed in this case violate Respondents' rights not to be placed in double jeopardy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Petrus is an opthalmologist who has practiced in Austin, Texas. I.G. Ex. 173 /5-6.[2]

2. Respondent Eye Center is a professional corporation. I.G. Ex. 112 /2; Tr. at 453.[3]

3. From May 12, 1983 through January 21, 1984, Respondent Petrus was the sole owner and operator of Respondent Eye Center. Tr. at 453.

4. Respondent Petrus had sole authority for hiring and promoting employees at Respondent Eye Center, and personally wrote all paychecks on behalf of Respondent Eye Center. Tr. at 192-195, 476-478, 1150-1151, 1152, 1162, 1267-1268.

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[1] On October 3, 1990, Respondents moved to dismiss on the basis that the manner in which this case had been brought against them violated their due process rights. I issued a ruling on October 9, 1990, denying their motion.

[2] The Inspector General's exhibits received into evidence at the hearing are cited I.G. Ex. (number)/(page(s)).

[3] The transcript of the hearing is cited Tr. at (page(s)).

5. Respondent Petrus directed Respondent Eye Center's employees to prepare and submit claims for Medicare and Medicaid reimbursement. Tr. at 1152, 1158-1159, 1164-1165, 1168, 1169, 1201, 1240, 1253, 1261.

6. Respondents Petrus and Eye Center had identification or provider numbers for both the Medicare and Medicaid programs. Tr. at 1035, 1103, 1138.

7. On June 10, 1982, Respondent Petrus was sent a notice of suspension from participation in Medicare and Medicaid, pursuant to section 1128(a) of the Social Security Act. I.G. Ex. 100; Tr. at 91.

8. The suspension was based on Respondent Petrus' December 21, 1979 conviction of a criminal offense related to his participation in the Texas Medicaid program. I.G. Ex. 100; Tr. at 91.

9. The suspension notice informed Respondent Petrus that no payments would be made for items or services he furnished either directly or as an employee of a provider of services after the effective date of the suspension. I.G. Ex. 100/2.

10. Respondent Petrus obtained a temporary restraining order and a preliminary injunction prohibiting the suspension from going into effect. I.G. Ex. 102/2-3; Tr. at 94.

11. Subsequently, Respondent Petrus entered into a settlement agreement with the Department of Health and Human Services. I.G. Ex. 102/1-6; Tr. at 94.

12. The settlement agreement provided that Respondent Petrus would be suspended from participating in Medicare and Medicaid for six months. I.G. Ex. 102/3; Tr. at 98.

13. The settlement agreement provided that the suspension would automatically become effective seven days after the date a court order was signed and entered dissolving the preliminary injunction. I.G. Ex. 102/5; Tr. at 98, 101.

14. A court order dissolving the preliminary injunction was signed and entered on May 5, 1983. I.G. Ex. 104; Tr. at 107.

15. Respondent Petrus' suspension from participating in Medicare and Medicaid became effective beginning May 12, 1983. Respondent Petrus was barred from receiving payment for any Medicare or Medicaid item or service

furnished by him during the period of his suspension. I.G. Ex. 102/5; 105/2; Social Security Act, section 1862(e).

16. A party who is suspended or excluded from participating in Medicare and Medicaid pursuant to section 1128(a) of the Social Security Act is not automatically entitled to reinstatement. Tr. at 1270; See 42 C.F.R. 1001.130, 1001.132.

17. A suspended or excluded party must request that he or she be reinstated in order to be reinstated. See 42 C.F.R. 1001.130.

18. A party's reinstatement request will not be approved unless it is reasonably certain that that party will not repeat the violations that led to his or her suspension or exclusion. See 42 C.F.R. 1001.132.

19. On August 12, 1983, Respondent Petrus requested reinstatement. I.G. Ex. 120.

20. On November 3, 1983, the I.G. sent Respondent Petrus a questionnaire in order to ascertain whether Respondent Petrus satisfied the criteria by which reinstatement could be granted. I.G. Ex. 120; Tr. at 1270-1271.

21. Respondent Petrus was advised that a determination regarding his reinstatement request would be based on information that he was requested to supply, as well as on consultations with various agencies. I.G. Ex. 120.

22. On November 9, 1983, Respondent Petrus submitted a statement in response to the questionnaire. I.G Ex. 121/1-2.

23. Later in November, 1983, the I.G. notified Respondent Petrus' attorney that Respondent Petrus' reinstatement request was being reviewed. I.G. Ex. 119.

24. The I.G. did not reinstate Respondent Petrus at the end of the six month suspension period, and the suspension continued in effect. Tr. at 1477.

25. On June 7, 1989, the I.G. sent a notice to Respondents alleging that they had presented or caused to be presented claims for 275 items or services in violation of the Civil Monetary Penalties Law, section 1128A of the Social Security Act. I.G. Ex. 97.

26. The allegedly false claims are listed in Attachment A, attached to the notice, and are enumerated as separate counts at attachment 1 of the I.G.'s Posthearing Brief. I.G. Ex. 97.

27. The I.G. withdrew its allegations with respect to counts 20, 21, 48, and 49.[4]

28. The 271 remaining counts represent items or services which Respondent Eye Center claimed were provided between May 12, 1983, and January 21, 1984. I.G. Ex. 1, 2, 2b, 3-6, 7.1, 7.2, 7.3, 8-11, 13, 14.1, 14.2, 15.2, 16, 17.1, 17.2, 18.2, 18.5, 18.4, 18.6, 18.7, 19, 19b, 20.1, 20.2, 20.4, 20.5, 20.6, 21, 22-32, 33.1, 34-36, 37.1, 37.2, 38, 39.1, 39.2, 39b.3, 40, 41-45, 46.1, 46.2, 46.4, 47-61, 62.1, 62.2, 63, 64, 65.1, 65.2, 66-68, 69.1, 69.2, 70, 71, 72.1, 73, 74.1, 74.2, 75.1, 75.2, 76, 77.1, 78-83, 84.1, 84.2, 85, 86.1, 87.1, 87.2, 88, 89.1, 89.2, 90.1, 91-96.

29. Respondent Eye Center presented all 271 of the claims at issue. Finding 28; Social Security Act, section 1128A.

30. Respondent Petrus caused all 271 of the claims at issue to be presented. Findings 3-5; Social Security Act, section 1128A.

31. Blue Cross and Blue Shield of Texas ("Blue Cross") has a contract with the Department to process Medicare claims in Texas. Tr. at 1022.

32. The National Heritage Insurance Company ("NHIC") has a contract with the State of Texas to process Medicaid claims in Texas. Tr. at 1095.

33. All of the claims for items or services at issue in this case were received for processing as Medicare claims by Blue Cross or as Medicaid claims by NHIC. I.G. Ex. 1, 2, 2b, 3-6, 7.1, 7.2, 7.3, 8-11, 13, 14.1, 14.2, 15.2, 16, 17.1, 17.2, 18.2, 18.5, 18.4, 18.6, 18.7, 19, 19b, 20.1, 20.2, 20.4, 20.5, 20.6, 21, 22-32, 33.1, 34-36, 37.1, 37.2, 38, 39.1, 39.2, 39b.3, 40, 41-45, 46.1, 46.2,

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[4] For purposes of clarity, these Findings refer to the claims at issue as they are enumerated at Attachment 1 to the I.G.'s Posthearing Brief. However, Attachment 1 is merely a summary and has no evidentiary value. Therefore, all Findings in this Decision are supported by references to Exhibits in evidence or to the Transcript of the proceedings.

46.4, 47-61, 62.1, 62.2, 63, 64, 65.1, 65.2, 66-68, 69.1, 69.2, 70, 71, 72.1, 73, 74.1, 74.2, 75.1, 75.2, 76, 77.1, 78-83, 84.1, 84.2, 85, 86.1, 87.1, 87.2, 88, 89.1, 89.2, 90.1, 91-96.

34. The earliest date when any of the items or services at issue were received for processing by Blue Cross or by NHIC was June 8, 1983. I.G. Ex. 5, 16, 17.1, 18.5, 20.1, 25, 26, 41, 43, 50, 52, 58, 65.1; See Finding 33. Tr. at 1038-1041, 1105-1106, 1110.

35. The I.G. may initiate an action under section 1128A of the Social Security Act within six years of the date that a claim at issue was presented. Social Security Act, section 1128A(c).

36. For purposes of determining whether an action was initiated within the six-year statute of limitations, the term "presented" refers to the date on which a claim was received by an agent acting on behalf of the United States or a state. Social Security Act, section 1128A(c).

37. All of the 271 claims at issue were presented within six years of the date of the notice letter. Findings 25, 33.

38. For each of the 271 claims at issue, the I.G. initiated his action against Respondents within the six-year statute of limitations. Finding 37; Social Security Act, section 1128A(c).

39. Dr. Paul Malsky was hired by Respondent Petrus pursuant to an oral contract to examine and treat patients at Respondent Eye Center, and was assigned Medicare and Medicaid provider numbers. I.G. Ex. 168 at 13, 22; Tr. at 477-478, 600, 1035-1036, 1103, 1138.

40. During the term of his contract, Dr. Malsky was the only physician who worked for Respondent Petrus. Findings 41-43; Tr. at 476, 1153.

41. Pursuant to his agreement with Respondent Petrus, Dr. Malsky worked at Respondent Eye Center on Wednesdays and Fridays. Tr. at 477.

42. Dr. Malsky was never at Respondent Eye Center on a day other than a Wednesday or a Friday. Tr. at 478.

43. Dr. Malsky worked at Respondent Eye Center on the following Wednesdays and Fridays in 1983: June 15, 17, 22, 24, and 29, July 1, 6, 8, 13, 15, 20, 22, 27, and 29,

August 3, 5, 10, 12, 17, 19, 24, 26, and 31, September 2, 7, 9, 14, 16, 21, 23, 28, and 30, and October 5, 7, and 12. Tr. at 481-483.

44. Dr. Malsky routinely made treatment notes of the patients he treated. I.G. 168/17, 18; Tr. at 486, 487, 522, 645.

45. Dr. Gregory Baer was hired by Respondent Petrus pursuant to an oral contract to examine and treat patients at Respondent Eye Center, and was assigned Medicare and Medicaid provider and identification numbers. Tr. at 194, 195, 1035-1036, 1103, 1138.

46. During the term of his contract, Dr. Baer was the only physician who worked for Respondent Petrus. Findings 47-50, 52, 54; Tr. at 192, 1153.

47. Dr. Baer worked at Respondent Eye Center on specified dates. Tr. at 194.

48. Usually, Dr. Baer would be notified a day or two in advance of a date when he was requested to work at Respondent Eye Center. Tr. at 194.

49. Dr. Baer worked at Respondent Eye Center on the following dates in 1983: November 8, 11, and 22, and December 6 and 20. Tr. at 195.

50. Dr. Baer worked at Respondent Eye Center on the following dates in 1984: January 10 and 21. Tr. at 195.

51. Dr. Baer always recorded the procedures he performed at Respondent Eye Center. I.G. Ex. 135/6, 170/25, 171/11-12, 14, 16, 18, 19; Tr. at 215, 216, 271, 249, 350-351.

52. In addition to his work at Respondent Eye Center, Dr. Baer also worked for Respondent Petrus in performing outpatient surgery at Bailey Square, an outpatient surgical facility. Tr. at 218-219.

53. Dr. Baer's services at Bailey Square were provided on dates when he was also present at Respondent Eye Center, except on December 27, 1983, when Dr. Baer provided services at Bailey Square but not at Respondent Eye Center. Tr. at 224.

54. Of the 271 items or services at issue, 97 items or services, enumerated at counts 4, 5, 11-13, 16, 17, 29, 36-41, 51-57, 59-61, 65-72, 87-90, 93, 94, 97-102, 104, 107, 117, 133-138, 144, 145, 148, 151, 154, 155, 157,

158, 161, 162, 171, 177, 184, 188-191, 196, 205, 213-216, 221, 223-228, 235, 246, 247, 249, 258-263, 268, 269, 271, and 272, are for items or services claimed as having been provided by Respondent Petrus. I.G. Ex. 2, 5, 7.1, 7.2, 11, 14.1, 16, 17.1, 18.2, 18.4, 18.5, 20.1, 20.2, 22-26, 28, 30, 34, 38, 39.1, 41, 43, 47, 49, 50, 52, 55, 58, 62.1, 64, 65.1, 67, 70, 73, 74.1, 74.2, 76, 78, 79, 80, 83, 87.1, 88, 91, 93, 94, 95; Tr. at 1035, 1103.

55. With the exception of the items or services stated in the claims enumerated at counts 87-90, all of the 97 items or services claimed as having been provided by Respondent Petrus were claimed to have been provided on dates when Respondent Petrus was the only physician working at Respondent Eye Center. I.G. Ex. 2, 5, 7.1, 7.2, 11, 14.1, 16, 17.1, 18.2, 18.4, 18.5, 20.1, 20.2, 22-26, 28, 30, 34, 38, 39.1, 41, 43, 47, 49, 50, 52, 55, 58, 62.1, 64, 65.1, 67, 70, 73, 74.1, 74.2, 76, 78, 79, 80, 83, 87.1, 88, 91, 93, 94, 95; Findings 41-43, 47-50, 52, 54.

56. With respect to the items or services stated in the claims enumerated at counts 87-90, Dr. Baer was the only physician working for Respondent Petrus on the date when these items or services were provided. Findings 47-50, 52, 54.

57. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 87-90. Tr. at 313.

58. To the extent that items or services were provided in the claims enumerated in counts 4, 5, 11-13, 16, 17, 29, 36-41, 51-57, 59-61, 65-72, 87-90, 93, 94, 97-102, 104, 107, 117, 133-138, 144, 145, 148, 151, 154, 155, 157, 158, 161, 162, 171, 177, 184, 188-191, 196, 205, 213-216, 221, 223-228, 235, 246, 247, 249, 258-263, 268, 269, 271, and 272, Respondent Petrus provided them, or they were provided incident to his services. Findings 54-57.

59. Of the 271 items or services at issue, 174 items or services, enumerated at counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, are for items or services claimed to have been provided either by Dr. Malsky or by Dr. Baer. I.G. Ex. 1, 2b, 3, 4, 6, 7.3, 8-11, 13, 14.2, 15.2, 17.2, 18.4, 18.7, 19, 20.4, 20.5, 20.6, 21, 23, 24, 27, 29, 30, 31,

32, 33.1, 35, 36, 37.1, 37.2, 39.2, 39b.3, 40, 42, 44, 45, 46.1, 46.4, 48, 51, 53, 54, 56, 57, 59-61, 62.2, 63, 65.2, 66, 68, 69.1, 69.2, 71, 72.1, 75.1, 75.2, 77.1, 80-82, 84.1, 84.2, 85, 86.1, 87.2, 89.1, 89.2, 90.1, 92, 93, 96; Tr. at 1035-1036, 1102, 1103.

60. The items or services stated in the claims enumerated at counts 1-3, 6, 7, 26-28, 30, 31, 32-35, 36-47, 51-56, 58, 62-64, 73-82, 91-96, 113-115, 119-124, 139-143, 146, 147, 152, 153, 156, 159, 160, 165-170, 175, 176, 178-180, 182, 186, 187, 192, 193-195, 203, 210-212, 229-234, 239-243, 250-253, 256, 257, 264-267, 270, and 273-275, were claimed as having been provided by Dr. Malsky. I.G. Ex. 1, 2b, 10, 11, 13, 14.1, 14.2, 16, 17.2, 18.4, 18.7, 19, 20.4, 20.5, 20.6, 23, 24, 31, 32, 33.1, 36, 39.2, 39b.3, 40, 42, 46.1, 46.4, 48, 51, 54, 57, 59-61, 63, 65.2, 66, 69.2, 72.1, 80-82, 85, 86.1, 89.1, 90.1, 92, 93, 96; Tr. at 1035-1036, 1102, 1103.

61. To the extent that they were provided, the items or services stated in the claims enumerated at counts 1-3, 6, 7, 26-28, 30, 31, 32-35, 36-47, 51-56, 58, 62-64, 73-82, 91-96, 113-115, 119-124, 139-143, 146, 147, 152, 153, 156, 159, 160, 165-170, 175, 176, 178-180, 182, 186, 187, 192, 193-195, 203, 210-212, 229-234, 239-243, 250-253, 256, 257, 264-267, 270, and 273-275, were provided on dates when Dr. Malsky did not work for Respondent Petrus, either at Respondent Eye Center, or elsewhere. Findings 41-43.

62. Dr. Malsky did not provide the items or services stated in the claims enumerated at counts 1-3, 6, 7, 26-28, 30, 31, 32-35, 36-47, 51-56, 58, 62-64, 73-82, 91-96, 113-115, 119-124, 139-143, 146, 147, 152, 153, 156, 159, 160, 165-170, 175, 176, 178-180, 182, 186, 187, 192, 193-195, 203, 210-212, 229-234, 239-243, 250-253, 256, 257, 264-267, 270, and 273-275. Findings 60-61.

63. Dr. Malsky was the only physician working for Respondent Petrus on the dates when the items or services stated in the claims enumerated at counts 1-3, 6, 7, 26-28, 30, 31, 32-35, 36-47, 51-56, 58, 62-64, 73-82, 91-96, 113-115, 119-124, 139-143, 146, 147, 152, 153, 156, 159, 160, 165-170, 175, 176, 178-180, 182, 186, 187, 192, 193-195, 203, 210-212, 229-234, 239-243, 250-253, 256, 257, 264-267, 270, and 273-275, were claimed to have been provided. Findings 40-43.

64. To the extent that items or services were provided in the claims enumerated at counts 1-3, 6, 7, 26-28, 30, 31, 32-35, 36-47, 51-56, 58, 62-64, 73-82, 91-96, 113-115, 119-124, 139-143, 146, 147, 152, 153, 156, 159, 160,

165-170, 175, 176, 178-180, 182, 186, 187, 192, 193-195, 203, 210-212, 229-234, 239-243, 250-253, 256, 257, 264-267, 270, and 273-275, Respondent Petrus provided them, or they were provided incident to his services. Findings 62-63.

65. The items or services stated in the claims enumerated at counts 111 and 236-238 were claimed to have been provided by Dr. Baer. I.G. Ex. 30, 84.1, 84.2; Tr. at 1035-1036, 1102, 1103.

66. The items or services stated in the claims enumerated as counts 111 and 236-238 were provided on dates when Dr. Baer did not work for Respondent Petrus. Findings 47-50, 52, 54.

67. Dr. Baer did not provide the items or services stated in the claims enumerated as counts 111 and 236-238. Findings 65, 66.

68. Dr. Baer was the only physician working for Respondent Petrus on the dates when the items or services stated in the claims enumerated as counts 111 and 236-238 were provided. Findings 46-50.

69. To the extent that items or services were provided in the claims enumerated in counts 111 and 236-238, Respondent Petrus provided them, or they were provided incident to his services. Findings 65-68.

70. The items or services stated in the claims enumerated at counts 22-25, 50, 81, 82, 116, 181, 217-220, 222, 244, 245, and 248, were claimed to have been provided by Dr. Malsky. I.G. Ex. 9, 15.2, 20.6, 33.1, 61, 75.1, 75.2, 77.1, 86.1, 87.2.

71. Dr. Malsky did not order or provide the items or services stated in the claims enumerated at counts 22-25. Tr. at 524-525.

72. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 22-25 were claimed to have been provided. Findings 40-43.

73. To the extent that items or services stated in the claims enumerated at counts 22-25 were provided, they were provided by Respondent Petrus. Findings 71, 72.

74. Dr. Malsky did not provide the items or services stated in the claim enumerated at count 50. I.G. Ex. 15e/14; Tr. at 127-129, 130, 135-136.

75. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at count 50 were claimed to have been provided. Findings 40-43.

76. To the extent that items or services stated in the claim enumerated at count 50 were provided, they were provided by Respondent Petrus. Findings 74, 75; I.G. Ex. 15e/14; Tr. at 127-129, 130, 135-136.

77. The items or services stated in the claims enumerated at counts 81 and 82 were not provided by Dr. Malsky or incident to his services. I.G. Ex. 20d/16; Tr. at 359-360, 478, 847, 850, 1580-1582.

78. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 81 and 82 were claimed to have been provided. Findings 40-43.

79. To the extent items or services stated in the claims enumerated at counts 81 and 82 were provided, they were provided incident to the services of Respondent Petrus. Findings 77, 78.

80. Dr. Malsky did not provide the items or services stated in the claim enumerated at count 116. I.G. Ex. 33d/1, /13, /15, /18; Tr. at 972, 975-976, 982-983.

81. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 116 were claimed to have been provided. Findings 40-43.

82. To the extent items or services stated in the claim enumerated at count 116 were provided, they were provided by Respondent Petrus. Findings 80, 81.

83. Dr. Malsky did not provide the items or services stated in the claim enumerated at count 181. Tr. at 972, 978-979.

84. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at count 181 were claimed to have been provided. Findings 40-43.

85. To the extent items or services stated in the claim enumerated at count 181 were provided, they were provided by Respondent Petrus. Findings 83, 84.

86. Dr. Malsky did not order or provide the items or services stated in the claims enumerated at counts 217 and 218. Tr. at 567, 674.

87. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 217 and 218 were claimed to have been provided. Findings 40-43.

88. To the extent items or services stated in the claims enumerated at counts 217 and 218 were provided, they were provided incident to the services of Respondent Petrus. Findings 86, 87; I.G. Ex. 75d/2.

89. Dr. Malsky did not provide the items or services stated in the claims enumerated at counts 219 and 220. I.G. Ex. 75f/23, /26, /28, /31, 157.

90. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 219 and 220 were claimed to have been provided. Findings 40-43.

91. To the extent items or services stated in the claims enumerated at counts 219 and 220 were provided, they were provided by Respondent Petrus. Findings 89, 90.

92. Dr. Malsky did not provide the items or services stated in the claim enumerated at count 222. I.G. Ex. 164/134.

93. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at count 222 were claimed to have been provided. Findings 40-43.

94. To the extent items or services stated in the claim enumerated at count 222 were provided, they were provided by Respondent Petrus, or incident to his services. Findings 92, 93.

95. Dr. Malsky did not provide the items or services stated in the claims enumerated at counts 244 and 245. Tr. at 145-146; See I.G. Ex. 86d/1, 86e/22.

96. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 244 and 245 were claimed to have been provided. Findings 40-43.

97. To the extent items or services stated in the claims enumerated at counts 244 and 245 were provided, they were provided by Respondent Petrus. Findings 92, 93.

98. Dr. Malsky did not provide the items or services stated in the claim enumerated at count 248. I.G. Ex. 87d/13, /15, /17; Tr. at 972, 989-990.

99. Dr. Malsky was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at count 248 were claimed to have been provided. Findings 40-43.

100. To the extent items or services stated in the claims enumerated at counts 248 were provided, they were provided by Respondent Petrus. Findings 95, 96.

101. The items or services stated in the claims contained at counts 8-10, 14, 15, 18, 19, 83-86, 103, 105, 106, 108, 109, 112, 125-132, 149, 150, 163, 164, 172-174, 185, 197-202, 254, and 255, were claimed as having been provided by Dr. Baer. I.G. Ex. 3, 4, 6, 7.3, 8, 21, 27, 29, 30, 37.1, 37.2, 44, 45, 53, 56, 62.2, 68, 69.1, 89.2.

102. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 8 and 9. Tr. at 209-210, 301.

103. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 8 and 9 were claimed to have been provided. Findings 46-50, 52, 54.

104. To the extent items or services stated in the claims enumerated at counts 8 and 9 were provided, they were provided by Respondent Petrus. Findings 99, 100; Tr. at 209-210; 301.

105. Dr. Baer did not provide the items or services stated in the claim enumerated at count 10. Tr. at 269.

106. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at count 10 were claimed to have been provided. Findings 46-50, 52, 54.

107. To the extent items or services stated in the claim enumerated at count 10 were provided, they were provided by Respondent Petrus. Findings 102, 103; Tr. at 269.

108. Dr. Baer did not provide the items or services stated in the claim enumerated at counts 14 and 15. Tr. at 270-271; See I.G. Ex. 6d/7.

109. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at counts 14 and 15 were claimed to have been provided. Findings 46-50, 52, 54.

110. To the extent items or services stated in the claim enumerated at counts 14 and 15 were provided, they were provided by Respondent Petrus. Finding 106; Tr. at 270-271; See I.G. Ex. 6d/7.

111. Dr. Baer did not provide the items or services stated in the claim enumerated at count 18. See I.G. Ex. 7b/1; I.G. Ex. 7b/5, /8, /11, /14.

112. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at count 18 were claimed to have been provided. Findings 46-50, 52, 54.

113. To the extent items or services stated in the claim enumerated at count 18 were provided, they were provided by Respondent Petrus. Findings 108, 109; See I.G. Ex. 7b/1; I.G. Ex. 7b/5, /8, /11, /14.

114. Dr. Baer did not order or provide the items or services enumerated at count 19. Tr. at 272-273; See I.G. Ex. 8d/4.

115. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at count 19 were claimed to have been provided. Findings 46-50, 52, 54.

116. To the extent items or services stated in the claim enumerated at count 19 were provided, they were provided incident to the services of Respondent Petrus. Findings 111, 112; Tr. at 272-273; See I.G. Ex. 8d/4.

117. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 83-86. Tr. at 302-303.

118. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at counts 83-86 were claimed to have been provided. Findings 46-50, 52, 54.

119. To the extent items or services stated in the claims enumerated at counts 83-86 were provided, they were provided by Respondent Petrus. Findings 114, 115; I.G. Ex. 132/15-16, 137/3-4, 139/6; Tr. at 245, 302-303.

120. Dr. Baer did not provide the items or services stated in the claim enumerated at count 103. Tr. at 275.

121. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at count 103 were claimed to have been provided. Findings 46-50, 52, 54.

122. To the extent items or services stated in the claim enumerated at count 103 were provided, they were provided by Respondent Petrus. Findings 117, 118.

123. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 105 and 106.

124. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 105 and 106 were claimed to have been provided. Findings 46-50, 52, 54.

125. To the extent items or services stated in the claims enumerated at counts 105 and 106 were provided, they were provided by Respondent Petrus, or were provided incident to his services. Findings 120, 121; Tr. at 219, 847, 850.

126. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 108, 109, and 112. Tr. at 278-279; See I.G. Ex. 164/182.

127. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 108, 109, and 112 were claimed to have been provided. Findings 46-50, 52, 54.

128. To the extent items or services stated in the claims enumerated at counts 108, 109, and 112 were provided, they were provided by Respondent Petrus. Findings 123, 124.

129. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 125-132. Tr. at 305.

130. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 125-132 were claimed to have been provided. Findings 46-50, 52, 54.

131. To the extent items or services stated in the claims enumerated at counts 125-132 were provided, they were provided by Respondent Petrus. Findings 126, 127.

132. Dr. Baer did not provide the items or services stated in the claim enumerated at count 149. Tr. at 280.

133. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at count 149 were claimed to have been provided. Findings 46-50, 52, 54.

134. To the extent items or services stated in the claim enumerated at count 149 were provided, they were provided by Respondent Petrus. Findings 129, 130.

135. Dr. Baer did not provide the items or services stated in the claim enumerated at count 150. Tr. at 281.

136. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at count 150 were claimed to have been provided. Findings 46-50, 52, 54.

137. To the extent items or services stated in the claim enumerated at count 150 were provided, they were provided by Respondent Petrus. Findings 132, 133.

138. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 163 and 164. Tr. at 284.

139. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 163 and 164 were claimed to have been provided. Findings 46-50, 52, 54.

140. To the extent items or services stated in the claims enumerated at counts 163 and 164 were provided, they were provided by Respondent Petrus. Findings 135, 136.

141. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 172-174. Tr. at 288.

142. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 172-174 were claimed to have been provided. Findings 46-50, 52, 54.

143. To the extent items or services stated in the claims enumerated at counts 172-174 were provided, they were provided by Respondent Petrus. Findings 138, 139.

144. Dr. Baer did not provide the items or services stated in the claim enumerated at count 185. Tr. at 291.

145. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claim enumerated at count 185 were claimed to have been provided. Findings 46-50, 52, 54.

146. To the extent items or services stated in the claim enumerated at count 185 were provided, they were provided by Respondent Petrus. Findings 141, 142.

147. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 197-199. Tr. at 212, 213, 308.

148. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 197-199 were claimed to have been provided. Findings 46-50, 52, 54.

149. To the extent items or services stated in the claim enumerated at counts 197-199 were provided, they were provided by Respondent Petrus. Findings 144, 145.

150. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 200-202. Tr. at 308, 309.

151. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 200-202 were claimed to have been provided. Findings 46-50, 52, 54.

152. To the extent items or services stated in the claims enumerated at counts 200-202 were provided, they were provided by Respondent Petrus. Findings 148, 149.

153. Dr. Baer did not provide the items or services stated in the claims enumerated at counts 254 and 255. Tr. at 298, 299.

154. Dr. Baer was the only physician working for Respondent Petrus on the date when the items or services stated in the claims enumerated at counts 254 and 255 were claimed to have been provided. Findings 46-50, 52, 54.

155. To the extent items or services stated in the claims enumerated at counts 254 and 255 were provided, they were provided by Respondent Petrus. Findings 150, 151.

156. All 271 claims at issue in this case are Medicare or Medicaid claims for items or services which, to the extent they were provided, were provided by or incident to the services of Respondent Petrus during a period when he was suspended from participation in Medicare and Medicaid. Findings 15, 24, 54-152.

157. All 271 claims at issue in this case are Medicare or Medicaid claims for which payment may not be made, because they were claims for items or services which, to the extent they were provided, were provided by or incident to the services of Respondent Petrus during a period when he was suspended from participation in Medicare and Medicaid. Finding 153; Social Security Act, Section 1128(A)(1)(a)(d).

158. The items or services stated in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, were not provided as claimed because the claims falsely represented the identity of the physician who was claimed to have provided the items or services. Findings 59-152.

159. Respondent Petrus told neither Dr. Malsky nor Dr. Baer at the inception of their relationship with him and Respondent Eye Center that he was suspended from participation in Medicare and Medicaid. Tr. at 225-226, 501.

160. In May, 1983, Respondent Petrus instructed his office staff to refrain from filing Medicare and Medicaid reimbursement claims for his services until a new physician was hired to work at Respondent Eye Center. Tr. at 791-793.

161. Respondent Petrus instructed his office staff that, once a new physician was hired, the retained claims were to then be filed, using the new physician's provider number to identify the provider of items or services. I.G. Ex. 141/1; 167/12-13; Tr. at 792-793.

162. The claims which were subject to these instructions by Respondent Petrus included claims for Medicare and Medicaid items or services provided by him in May and June, 1983. Tr. at 793.

163. Around the time that Dr. Malsky began working for Respondent Petrus, a large number of Medicare and Medicaid reimbursement claims which had identified Respondent Petrus as the provider of services were rejected by the Medicare carrier or the Medicaid intermediary and were returned unpaid to Respondent Eye Center. Tr. at 1162-1163.

164. Respondent Petrus instructed his office staff to change the provider identification number on the claims from his own number to Dr. Malsky's number and to resubmit the claims. Tr. at 1163, 1165.

165. Pursuant to Respondent Petrus' instructions, his office staff changed the provider identification number from Respondent Petrus' number to Dr. Malsky's number and resubmitted the claims. Tr. at 1164-1165.

166. The effect of these resubmissions was to claim reimbursement for items or services as if they had been provided by Dr. Malsky, even though, to the extent they had been provided, they were provided by Respondent Petrus. Findings 160, 161.

167. Respondent Petrus advised his office staff that all Medicare and Medicaid patients would be examined and treated by Dr. Malsky. Tr. at 1158.

168. Respondent Petrus instructed his office staff to identify Dr. Malsky as the provider of services on all Medicare and Medicaid reimbursement claims. Tr. at 1158-1159.

169. Pursuant to Respondent Petrus' instructions, and during the time that Dr. Malsky worked for Respondent Petrus, Respondent Petrus' office staff identified Dr. Malsky as the provider of services on Respondent Eye Center's Medicare and Medicaid reimbursement claims, regardless of whether Dr. Malsky actually provided the items or services which were claimed. Tr. at 1168-1169.

170. In late July or August, 1983, Dr. Malsky learned from Respondent Petrus' office staff that Respondent Petrus had been suspended from participating in Medicare and Medicaid, and that, pursuant to Respondent Petrus' instructions, Dr. Malsky was being identified as the provider of services on Respondent Eye Center's Medicare and Medicaid reimbursement claims, regardless of whether he actually provided the items or services. Tr. at 500.

171. Dr. Malsky confronted Respondent Petrus with this information, and Respondent Petrus advised Dr. Malsky that it was irrelevant who was identified as the provider of services on Medicare and Medicaid claims, inasmuch as all payments were being made to Respondent Eye Center. Tr. at 500.

172. On August 10, 1983, Dr. Malsky, through his attorney, advised Respondent Petrus that it was illegal to identify Dr. Malsky as the provider of items or services in Medicare and Medicaid reimbursement claims when Dr. Malsky had not provided the items or services. I.G. Ex. 123.

173. Dr. Malsky requested that Respondent Petrus submit corrected reimbursement claims for those claims where reimbursement had been claimed under Dr. Malsky's provider number and either: the item or service claimed had not been provided by Dr. Malsky, or, the nature of the item or service provided by Dr. Malsky had been misstated. I.G. Ex. 123.

174. On September 28, 1983, Respondent Petrus replied to Dr. Malsky. I.G. Ex. 124.

175. Respondent Petrus asserted that it was his understanding that he had filed claims for Dr. Malsky's services only for days when Dr. Malsky worked at Respondent Eye Center and only when the patients had been seen either by Dr. Malsky alone, or by Dr. Malsky along with Respondent Petrus. I.G. Ex. 124.

176. Respondent Petrus asserted that any false claims were due to clerical errors and that claims were never intentionally falsified. I.G. Ex. 124.

177. Notwithstanding his discussions with Dr. Malsky and Dr. Malsky's attorney, Respondent Petrus did not instruct his staff to stop identifying Dr. Malsky as the provider of services on Respondent Eye Center's Medicare and Medicaid claims or correct the claims, as requested by Dr. Malsky. Tr. at 1169-1170.

178. Respondent Eye Center continued to file Medicare and Medicaid reimbursement claims which misrepresented Dr. Malsky as the provider of services, even after Dr. Malsky had requested Respondent Petrus to cease doing so. Findings 61-64, 86-88; I.G. Ex. 1, 10, 42, 46.1, 75.1, 96.

179. On October 12, 1983, Dr. Malsky terminated his relationship with Respondents. Tr. at 514.

180. Dr. Malsky terminated his relationship with Respondents because he concluded that claims continued to be filed which represented that he had provided items or services which, in fact, he had not provided. Tr. at 515.

181. Pursuant to Respondent Petrus' instructions, and during the time that Dr. Baer worked for Respondent Petrus, Respondent Petrus' office staff identified Dr. Baer as the provider of services on Respondent Eye Center's Medicare and Medicaid reimbursement claims, regardless of whether Dr. Baer actually provided the items or services which were claimed. Tr. at 1171-1172.

182. On January 21, 1984, Dr. Baer was told by an employee of Respondent Eye Center that Respondent Petrus had been suspended from participation in Medicare and Medicaid. Tr. at 225.

183. Dr. Baer was also told that he had been identified as the provider of items or services on Medicare and Medicaid reimbursement claims for items or services which he had not provided. Tr. at 225.

184. Dr. Baer terminated his relationship with Respondent Eye Center and Respondent Petrus on January 21, 1984. Tr. at 225.

185. In early 1984, a federal grand jury began an investigation into the Medicare billing practices of Respondent Petrus. Tr. at 244.

186. Dr. Baer was one of the witnesses subpoenaed to testify before the grand jury. Tr. at 244.

187. Between March 7, 1984, and July 19, 1984, Dr. Baer and Respondent Petrus had several telephone conversations. I.G. Ex. 132, 133, 134, 136, 137, 138, 139.

188. At numerous instances during these conversations, Respondent Petrus requested that Dr. Baer lie to the grand jury concerning his relationship with Respondents Petrus and Eye Center. I.G. Ex. 132/5-6, /7-8, /9, /10, /11, /15, /16, /18, 133/14-15, 137/3-4,/9, 138/7.

189. Respondent Petrus asked Dr. Baer to lie to the grand jury by stating that Respondent Petrus had provided items or services under Dr. Baer's supervision. I.G. Ex. 132/14.

190. Respondent Petrus asked Dr. Baer to lie to the grand jury by stating that he did not remember specific events when, in fact, Dr. Baer remembered those events. I.G. Ex. 132/9.

191. Respondent Petrus asked Dr. Baer to lie to Respondent Petrus' attorney, in order for Dr. Baer to keep his statements to the attorney consistent with his grand jury testimony. I.G. Ex. 134/9-10.

192. During his conversations with Dr. Baer, Respondent Petrus falsely asserted that the grand jury investigation into his Medicare billing practices was the consequence of improper or unlawful conduct by Dr. Malsky. I.G. Ex. 137/7, 138/7; Tr. at 248.

193. Respondent Petrus altered records of surgeries that had been created by employees at Bailey Square in order to make it appear that Dr. Malsky had performed surgical procedures which, in fact, he had not performed. I.G. Ex. 145, 146; Tr. at 495, 739-740.

194. Respondent Petrus knew that he would be suspended effective seven days from the date that a court order was entered dissolving the preliminary injunction which Respondent Petrus had obtained. I.G. Ex. 102/5, /6.

195. Respondent Petrus knew that a court order was entered on May 5, 1983, dissolving the preliminary injunction. I.G. Ex. 104.

196. Respondent Petrus knew that the suspension became effective May 12, 1983. I.G. Ex. 105/1, /4.

197. Respondent Petrus knew that he could apply for reinstatement upon completion of his suspension but that he would not automatically be reinstated. I.G. Ex. 102/4.

198. Respondent Petrus knew that he had not been reinstated at any time prior to January 21, 1984. Findings 19-24.

199. On October 19, 1984, Respondent Petrus was indicted in federal court for submitting false Medicare claims, submitting false Medicaid claims, and obstruction of justice. I.G. Ex. 106.

200. On May 2, 1985, Respondent Petrus pleaded guilty to one count of submitting false Medicare claims, one count of submitting false Medicaid claims, and one count of obstruction of justice. I.G. Ex. 107, 108, 109.

201. Respondent Petrus admitted that he had willfully and knowingly made false statements in representation of material facts for use in determining his rights to Medicare and Medicaid benefits. I.G. Ex. 109/25-27.

202. Respondent Petrus directed Respondent Eye Center and its employees to falsely claim reimbursement for items or services stated in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275. Findings 161-169, 181.

203. Respondent Petrus knew that Respondent Eye Center and its employees were executing his instructions to falsify claims. Findings 171-177.

204. Respondents knew that the items or services stated in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, were not provided as claimed. Findings 194, 195.

205. Respondents had sufficient information to place them on notice, as reasonable health care providers, that the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220,

222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, contained false statements. Findings 160-178.

206. Because Respondents had sufficient information to place them on notice that the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, contained false statements, Respondents were under a duty to assure that these claims were corrected.

207. Respondents failed to take any steps to correct the false statements in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275. Findings 165, 169, 181.

208. Respondents had reason to know that the items or services stated in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, were not provided as claimed. Findings 205-207.

209. Respondents were indifferent to whether the items or services stated in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, were provided as claimed. Findings 160-181.

210. Respondents were at least negligent in representing that the items or services stated in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, were provided as claimed. Finding 209.

211. Respondents should have known that the items or services stated in the claims enumerated in counts 1-3, 6-10, 14, 15, 18, 19, 22-28, 30-35, 42-47, 50, 58, 62-64, 73-86, 91, 92, 95, 96, 103, 105, 106, 108-116, 118-132, 139-143, 146, 147, 149, 150, 152, 153, 156, 159, 160, 163-170, 172-176, 178-183, 185-187, 192-195, 197-204, 206-212, 217-220, 222, 229-234, 236-245, 248, 250-257, 264-267, 270, and 273-275, were not provided as claimed. Finding 210.

212. Respondents presented or caused to be presented all 271 claims at issue in this case in violation of the Act. Findings 156, 157, 204, 208, 211.

213. The amount claimed by Respondents in the 271 claims at issue exceeded $40,000.00. I.G. Ex. 1, 2, 2b, 3-6, 7.1, 7.2, 7.3, 8-11, 13, 14.1, 14.2, 15.2, 16, 17.1, 17.2, 18.2, 18.5, 18.4, 18.6, 18.7, 19, 19b, 20.1, 20.2, 20.4, 20.5, 20.6, 21, 22-32, 33.1, 34-36, 37.1, 37.2, 38, 39.1, 39.2, 39b.3, 40, 41-45, 46.1, 46.2, 46.4, 47-61, 62.1, 62.2, 63, 64, 65.1, 65.2, 66-68, 69.1, 69.2, 70, 71, 72.1, 73, 74.1, 74.2, 75.1, 75.2, 76, 77.1, 78-83, 84.1, 84.2, 85, 86.1, 87.1, 87.2, 88, 89.1, 89.2, 90.1, 91-96.

214. The Act provides for the imposition of an assessment in lieu of damages of not more than twice the amount of each item or service which is falsely claimed. Social Security Act, section 1128A(a).

215. The Act provides for the imposition of a penalty of up to $2,000.00 for each item or service which is falsely claimed. Social Security Act, section 1128A(a).

216. In determining the appropriate amount of assessment and penalties to be imposed against Respondents, the Act and regulations direct that both aggravating and mitigating factors be considered. Social Security Act, section 1128A; 42 C.F.R. 1003.106.

217. The factors which may be considered as aggravating or mitigating include: (1) the nature of the claim or request for repayment; (2) respondent's degree of culpability; (3) respondent's history of prior offenses; (4) respondent's financial condition; and (5) such other matters as justice may require. 42 C.F.R. 1003.106.

218. If there are substantial or several aggravating circumstances, the aggregate amount of penalties and the assessments should be set at an amount sufficiently close to, or at, the maximum permitted by law. 42 C.F.R. 1003.106(c).

219. In proceedings brought pursuant to the Act, a respondent has the burden of proving the existence of any mitigating factors. 42 C.F.R. 1003.114(d).

220. The claims at issue were part of a scheme by Respondents to defraud Medicare and Medicaid. Findings 202-204; 42 C.F.R. 1003.106(b)(1).

221. The dollar amount of the false claims in this case is substantial. Finding 213; 42 C.F.R. 1003.106(b)(1).

221. Respondents' fraudulent conduct demonstrates contempt for the Medicare and Medicaid programs and for the beneficiaries and recipients of these programs.

222. Respondents' fraudulent conduct establishes a high level of culpability. 42 C.F.R. 1003.106(b)(2).

223. Respondent Petrus was convicted in 1979 of the criminal offense of tampering with a government record in connection with the Medicaid program. I.G. Ex. 99; See I.G. Ex. 100.

224. The false claims in this case constitute Respondents' second documented episode of fraudulent conduct with respect to a federally funded health care program. Finding 223; 42 C.F.R. 1003.106(b)(3).

225. The government incurred substantial costs in investigating the false claims at issue in this case. Tr. at 1065-1066, 1399-1400, 1402, 1403-1404, 1512; 42 C.F.R. 1003.106(b)(5).

226. Respondents unlawfully obtained substantial monies from Medicare and Medicaid as a consequence of their fraud. 42 C.F.R. 1003.106(b)(5).

227. Respondents attempted to cover up their unlawful conduct from investigating authorities. Findings 181-191, 193; 42 C.F.R. 1003.106(b)(5).

228. It is not a mitigating factor that the false claims in this case were filed over a relatively short period of time. See 42 C.F.R. 1003.106(b)(1).

229. Respondents have not established that imposition against them, jointly and severally, of assessments of $80,000.00 and penalties of $100,000.00, will jeopardize their ability to continue as health care providers. 42 C.F.R. 1003.106(b)(4).

230. Assessments of $80,000.00 and penalties of $100,000.00 imposed against Respondents, jointly and severally, are appropriate in this case.

ANALYSIS

1. The six-year statute of limitations provided in section 1128A(c)(1) of the Act applies to the claims for items or services at issue.

Respondents contend that this case is governed by a five-year statute of limitations. They assert that presentation of the case is barred, inasmuch as all claims at issue were presented more than five years previous to initiation of this case. Respondents' argument is essentially the same argument that they asserted in a prehearing motion concerning the statute of limitations. I issued a Ruling on February 6, 1990, which held that the six-year statute of limitations in section 1128A(c)(1) applied to the claims at issue. I have reconsidered the parties' arguments, and I reiterate my previous conclusion.

Prior to August 18, 1987, the Act did not contain a statute of limitations. Regulations provided, at 42 C.F.R. 1003.132, that a five-year period of limitations applied to cases brought pursuant to the Act. On August 18, 1987, the Act was amended to include a six-year statute of limitations, pursuant to section 3(b) of the Medicare and Medicaid Patient and Program Protection Act (MMPPPA). Pub. L. 100-93, 101 Stat. 680 (1987). The new statute of limitations became effective 14 days after enactment of the MMPPPA, and applied to all administrative proceedings initiated on or after September 1, 1987. The statute of limitations did not apply to administrative proceedings commenced prior to that date. This statute of limitations was subsequently incorporated into a revised 42 C.F.R. 1003.132. 52 Fed. Reg. 49,412 (Dec. 31, 1987); 42 C.F.R. 1003.132 (1987).

The six-year statute of limitations applies to all actions which are initiated after September 1, 1987. The I.G. initiates an action under the Act by serving notice in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure. Social Security Act, section 1128A(c)(1).

This action was initiated by the I.G.'s notice to Respondents dated June 7, 1989. I.G. Ex. 97. The action was therefore initiated after the effective date of the six-year statute of limitations enacted at section

1128A(c)(1), and is governed by that statute of limitations.

Respondents also argue that, in any event, they should not be subject to the six-year statute of limitations because, as applied to them, the six-year statute is an unlawful retroactive amendment of a statute of limitations. However, the MMPPPA did not amend a statute of limitations. Congress superseded a regulatory period of limitations with a statute. Rather than amending a statute of limitations, as Respondents contend, Congress enacted a statute of limitations to fill a legislative void.

2. The I.G. initiated a proceeding against Respondents not later than six years after the claims at issue were presented.

Respondents contend that the statute of limitations was "tolled" in this case on August 17, 1989. They argue that the date when this case was initiated should be determined by reference to the Federal Rules of Civil Procedure, Rule 3. This rule provides that a civil action is commenced by the filing of a complaint with a court. Respondents reason by analogy that this case was commenced on the date that it was assigned to an administrative law judge for a hearing and decision. That date, according to Respondents, was August 17, 1989. If this contention is accepted, then any of the claims at issue which were presented previous to August 17, 1983, would be presented beyond the six-year statute of limitations, and the I.G. would be precluded from pursuing an action with respect to those claims.

At issue here is the question of when the I.G. initiated this case within the meaning of section 1128A(c)(1). I conclude that this action was initiated on June 7, 1989, the date of the I.G.'s notice letter to Respondents. Therefore, any claims presented by Respondents after June 7, 1983, would be within the six-year statute of limitations.

Respondents' analysis ignores the plain language of section 1128A(c)(1). That section specifically defines initiation of an administrative proceeding by reference to Rule 4 of the Federal Rules of Civil Procedure and not

Rule 3, as is asserted by Respondents. Section 1128A(c)(1) provides that the Secretary (or his delegate, the I.G.):

> (M)ay initiate an action under this section by serving notice of the action in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure.

The action in this case was initiated on the date that the I.G. served notice of the action on Respondents, as authorized by Rule 4.

Rule 4 of the Federal Rules of Civil Procedure provides that a defendant may be served by mail. The notice letter in this case was dated June 7, 1989, and was mailed to Respondents certified mail, return receipt requested. Respondent Petrus signed the return receipt on June 10, 1989. I.G. Ex. 98.

Rule 4 is a rule governing the manner in which a summons and complaint may be served in civil actions commenced in federal courts. It is a rule which governs service of documents, not the initiation of actions. Under Rule 4, the date of service of a document would normally be the date that a party received that document, whether as a consequence of personal service or by mail.

However, Congress did not intend that Rule 4 be read literally into section 1128A(c)(1). When read in the context of section 1128A(c)(1), "service" must be read consistently with the word "initiate." These words have consistent meaning if "service" is read to mean <u>mailing</u>, rather than receipt, of an administrative complaint.

Statutes of limitations, including section 1128A(c)(1), are intended to prevent parties from sleeping on their rights beyond a point in time which the legislature has determined to be the reasonable limit for initiation of a proceeding. Once a party has acted to protect a right, that party has discharged the statutory obligation to timely bring an action. From that point, there is no statutory purpose served by penalizing a party for another's actions or inactions. It would be inconsistent with statutory purpose to apply a statute of limitations based on the date of a respondent's receipt of the I.G.'s notice. The act of receipt is an act which is beyond the ability of the I.G. to control. Furthermore, if the date of receipt of a notice were the trigger date for the statute of limitations, the clever respondent could cause the statute to run simply by avoiding receipt of the notice.

This interpretation of section 1128A(c)(1) is consistent with legislative history. The congressional committee responsible for the legislation which enacted the statute of limitations stated:

> In addition, the section clarifies that actions may be initiated either by serving notice by any means authorized by Rule 4, Federal Rules of Civil Procedure, including mailing notices by registered or certified mail, or by delivery to Respondent.

H.R. Rep. No. 100-85, Part 2, 100th Cong., 1st Sess. 16 (emphasis added). The date that the I.G. served notice on Respondents, thereby initiating this case, was June 7, 1989. All claims presented by Respondents after June 7, 1983 are within the statute of limitations.

The term "presented" as used in section 1128A(c)(1), means the date that claims for items or services are received by the recipient of the claims. Tommy G. Frazier and Prater Drugs, Inc., DAB Civ. Rem. C-127 (1990). The statute begins to run on the date when a party who is the addressee of a reimbursement claim under Medicare or Medicaid, receives that claim. The I.G. proved in this case that none of the claims at issue was received by the addressee of the claim earlier than June 8, 1983. Findings 31-34. The earliest date that any of the claims at issue was "presented" was June 8, 1983. All of the claims at issue in this case thus fall within the six year statute of limitations.

3. Rulings on the admissibility of evidence in this case did not violate Respondents' due process rights.

Respondents argue that two rulings that I made in this case concerning the admissibility of evidence violated their right to a fair hearing and deprived them of due process of law. At issue are rulings which I made excluding exhibits which Respondents offered as evidence and admitting into evidence copies of documents which the I.G. obtained from a federal grand jury, pursuant to a federal court order.

My exclusion of Respondents' exhibits was specifically authorized by section 1128A(c)(4)(B) of the Act. I excluded Respondents' exhibits because Respondents had willfully violated my Prehearing Order of November 1, 1989, which established a deadline in advance of the hearing for the parties to exchange proposed exhibits. The purpose of the deadline was to give each party adequate notice of his adversary's proposed evidence and

sufficient time to prepare for the hearing. Not only did Respondents fail to comply with that deadline, but Respondent Petrus asserted that he had no intention of complying with the deadline. Tr. at 1232-1234, 1236-1237. No excuse was offered by Respondents for their failure. It would have been unfair to the I.G. to have permitted the introduction of these exhibits in the circumstances under which they were offered.

Throughout this case, Respondents repeatedly and vociferously objected to the I.G.'s use of documents which the I.G. obtained pursuant to a court order from a federal grand jury. These documents include documents which the grand jury subpoenaed from Respondent Petrus as part of the investigation which resulted in his 1985 conviction of several criminal offenses related to some of the claims at issue in this case. The other documents obtained from the grand jury are the transcripts of testimony of several witnesses who appeared before that grand jury.

Respondents contend that Federal Rules of Criminal Procedure, Rule 6(e), bar the disclosure of documents subpoenaed by a grand jury. They assert that the I.G's obtaining of subpoenaed documents violated this rule, and any use of them by the I.G. ought to have been precluded. At various times, Respondents have moved that the I.G.'s complaint against Respondents be dismissed due to alleged misconduct related to obtaining the subpoenaed documents, that sanctions be imposed against the I.G. for his alleged misconduct, and that all exhibits which consist of documents released to the I.G. be excluded from the record of this case. I have consistently ruled against Respondents on these motions, most recently on August 15, 1990. Ruling Denying Respondents' Motion to Suppress Grand Jury Materials, August 15, 1990. I reiterate these rulings as part of this Decision.

As I observed in my August 15 Ruling, the documents in issue were released to the I.G. based on an application filed in United States District Court and an order signed by the court. The application for the release of the documents stated that the purpose of obtaining them would be their use by the I.G. in this case. See Respondents' Motion to Suppress Grand Jury Materials, August 7, 1990, Attachment A. There is nothing in the record of this case to suggest that the I.G. acted improperly with respect to the release of grand jury records. Respondents have not shown that the I.G.'s presentation of this case was tainted by misconduct. There exists no basis for me to impose sanctions against the I.G. or to dismiss this case based on misconduct. And, to the

extent that Respondents have any objection to the District Court's decision to release documents to the I.G., their right of recourse (if any) plainly lies with that court, and not in this proceeding.

There is also no basis for me to conclude that admission into evidence of documents released to the I.G. from the grand jury was unfair to Respondents. All of the documents subpoenaed from Respondents by the grand jury and obtained by the I.G. consisted of photocopies of records created and maintained by Respondents. Essentially, they were Respondents' office and patient treatment records. Respondents had intimate knowledge of these documents inasmuch as they were created and maintained by Respondents. The I.G. supplied copies of these documents to Respondents, as proposed exhibits, well in advance of the date of the hearing. Respondents were on notice that the documents would be offered, were familiar with their contents, and had ample time to prepare to defend against their use.

No unfairness resulted from admission of the transcripts of grand jury testimony. The transcripts of grand jury testimony released to the I.G. and offered as evidence in this case were provided, well in advance of the hearing, by the I.G. to Respondents as prior statements of witnesses. Respondents had time to review these transcripts prior to the hearing. Respondents were able to confront and cross examine each witness, inasmuch as the deponents were called by the I.G. as witnesses.

4. Denial of Respondents' motion to postpone the hearing was not unfair to Respondents.

Shortly before the scheduled date of the hearing, Respondents moved to indefinitely postpone the hearing. I denied that motion. Respondents continue to assert that my denial of that motion was unfair.

The asserted basis for Respondents' motion was that Respondent Petrus' poor health interfered with his ability to properly present his case. Respondents produced an exhibit, consisting of a report from Respondent Petrus' physician, which asserted that Respondent Petrus was unable to participate in the hearing due to a health problem.

I ruled that I would not base a decision to postpone the hearing on a physician's report. I afforded Respondents the opportunity to renew their motion at the hearing, provided that they produced the live testimony of a physician whom the I.G. could cross examine. I also

afforded the I.G. the opportunity to have Respondent Petrus examined by a physician of the I.G.'s choice and to present the testimony of a physician as rebuttal to evidence offered by Respondents.

Respondents sought to renew their motion on the first day of the hearing. They did not produce a physician to testify on their behalf; rather, Respondents averred that a physician would be produced on the morning of the second day of the hearing. I recessed the hearing, based on this representation, and the I.G. had Respondent Petrus examined by a physician.

On the morning of the second day of the hearing, Respondent Petrus announced that a physician would not be appearing to testify as promised. At that point, I denied Respondents' renewed motion and ordered the hearing to continue as scheduled.

Respondents continue to assert that it was unfair for me to hold the hearing as scheduled. They argue that: Respondent Petrus' health precluded holding "marathon" sessions, that I should have granted Respondents access to the report of the physician who examined Respondent Petrus at the I.G.'s behest, and that I should have, at least, accommodated Respondent Petrus' poor health by calling recesses more frequently.

However, there is no probative evidence of record in this case to show that Respondent Petrus was incapable of meeting the demands of the hearing schedule which I maintained.[5] I afforded Respondents the opportunity to prove that Respondent Petrus was incapable of participating in the hearing. They failed to avail themselves of that opportunity. I premised my refusal to grant Respondents access to any report obtained by the I.G. concerning Respondent Petrus' medical status on the fact that that report (assuming one was created) would have been prepared solely to rebut live testimony offered by Respondents. Inasmuch as Respondents failed to offer

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[5] On five of the six days of the hearing, I opened the record at 8:30 a.m. or later. Parties were provided a one hour lunch break on each day of the hearing, and I called frequent morning and afternoon recesses. No session of the hearing continued past 5:40 p.m., and most ended sooner.

live testimony, there was nothing for the I.G. to rebut, and Respondents had no need to see the report.[6]

5. Respondents presented or caused to be presented claims for items or services in violation of section 1128A of the Act.

This case involves 271 Medicare or Medicaid reimbursement claims presented between May 12, 1983 and January 21, 1984.[7] All 271 of these claims unlawfully sought reimbursement for items or services provided by Respondent Petrus or at his direction during a period of time when Respondent Petrus was suspended from participating in Medicare and Medicaid. In addition, 174 of the 271 claims falsely represent the name of the physician who provided or directed the items or services claimed. All of the claims were presented as part of a scheme by Respondents to defraud the Medicare and Medicaid programs.

Beginning May 12, 1983, Respondent Petrus was suspended from participating in Medicare and Medicaid.[8] The consequence of that suspension was that Respondent Petrus was barred from receiving reimbursement for any Medicare or Medicaid item or service that he provided, until such time as he was reinstated as a provider in Medicare and Medicaid. Respondent Petrus knew the effective date of

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[6] Respondents also moved twice during the hearing for me to recuse myself. Their motions were based on the rulings I made concerning admission of evidence and Respondents' motions that I postpone the hearing. I denied Respondents' motions and I reiterate the basis for that denial here. It was apparent to me at the hearing that many of Respondents' motions were frivolous and dilatory. Respondents' tactics included repetitive filing of essentially the same motions. However, my opinions as to Respondents' conduct of the case or their demeanor at the hearing have no bearing on my assessment of the evidence or my decision as to remedy.

[7] Some of the claims were either for Medicare or Medicaid reimbursement; many were concurrent claims for reimbursement from both Medicare and Medicaid.

[8] Respondent Petrus was suspended pursuant to section 1128(a) of the Social Security Act. The statute then in effect mandated the suspension from participation of parties convicted of program-related crimes. Respondent Petrus was convicted of a program-related crime in 1979. Finding 8.

the suspension and was aware of the terms and effect of his suspension. The suspension was the product of negotiations in which Respondent Petrus participated, and he signed the settlement agreement. Respondent Petrus knew that reinstatement would not be automatic, but would be conditioned on his proving that he was complying with the terms and conditions for participation established by Medicare and Medicaid. Respondent Petrus was never reinstated, and he knew that he had not been reinstated. Findings 7-24.

No sooner had the settlement been agreed to, and the suspension imposed, than Respondents set about to circumvent it. Respondents simply continued to submit reimbursement claims for items or services which identified Respondent Petrus as the provider of services even though Respondent Petrus was suspended at the time. However, the essence of Respondents' scheme was to claim reimbursement from Medicare and Medicaid, for items or services provided by Respondent Petrus, by disguising these items or services as having been provided by physicians who were participants in good standing with Medicare and Medicaid. The claims were made by, and payments were made to, Respondent Eye Center, an entity wholly controlled by Respondent Petrus. Respondent Petrus thereby attempted to pocket the proceeds of the claims without creating a paper trail which revealed him as unlawfully claiming reimbursement for items or services which he had provided.

Respondent Petrus contracted with other opthalmologists to assist him in providing services at Respondent Eye Center and at Bailey Square, an outpatient surgical facility. Respondent Petrus entered into two contracts. The first was with Dr. Paul Malsky, who began work with Respondent Petrus in June, 1983, and who terminated his relationship in October, 1983. Shortly thereafter, Respondent Petrus contracted with Dr. Gregory Baer, who worked with Respondent Petrus from November 8, 1983, until January 1984. Findings 39-51.

Respondent Petrus obtained the services and cooperation of these physicians by withholding the fact that he was suspended. He also did not tell these physicians that items or services that he was providing or directing would be claimed as if they had provided them. Both Drs. Malsky and Baer learned of Respondent Petrus' suspension, and the manner in which items or services were being claimed, from conversations with Respondent Eye Center's employees. Both physicians terminated their relationship with Respondent Petrus immediately upon learning the facts.

Respondent Petrus furthered the scheme by directing the Eye Center's staff not to present Medicare and Medicaid reimbursement claims for services he had provided in May and June, 1983, until a new physician was retained. He directed his staff to present these claims and all future Medicare and Medicaid reimbursement claims, regardless who actually provided or directed the items or services, as if the items or services had been provided or directed by Dr. Malsky. Findings 160-169. After Dr. Malsky left, Respondent Petrus directed his staff to attribute all Medicare or Medicaid items or services to Dr. Baer. Finding 181. Respondent Petrus also directed his staff to resubmit a large number of Medicare and Medicaid claims that had been returned unpaid to Respondent Eye Center and to change the identity of the provider to whom the items or services were attributed from Respondent Petrus to Dr. Malsky.

The scheme began to unravel early in 1984. Respondent Petrus sought to cover up his actions by attempting to persuade Dr. Baer to deliver perjured testimony to a federal grand jury. Finding 187-192. He also altered surgical records at Bailey Square, to make it look as if Dr. Malsky had provided items or services which, in fact, he had not provided. Finding 193.

As a consequence of their scheme, Respondents claimed reimbursement for more than $40,000.00 from Medicare and Medicaid. Respondent Petrus was eventually prosecuted on federal charges of Medicare and Medicaid fraud and obstruction of justice. In May, 1985, he pleaded guilty to two counts of fraud and one count of obstruction of justice. Respondent Petrus was sentenced to nine years' imprisonment, and fined $55,000.00. I.G. Ex. 108.

Respondents contend that the evidence does not prove a scheme to defraud Medicare. At most, according to Respondents, the evidence proves that employees at the Eye Center misunderstood Respondent Petrus' instructions to them or were negligent in their presentation of reimbursement claims. Respondents assert that Respondent Petrus' instructions to his staff were to not claim reimbursement from Medicare or Medicaid for services provided or directed by him. Thus, to the extent that claims for such services were filed, they were filed in error.

Respondents offered no evidence to directly refute the I.G.'s proof as to the purpose and sweep of Respondents' fraudulent scheme. Respondents' case mainly consists of attacks on the credibility and probative value of evidence offered by the I.G.

The record overwhelmingly supports the I.G.'s contentions. The record does show that, at times, Respondent Petrus would direct that Medicare or Medicaid services be provided free of charge. However, two former employees testified that Respondent Petrus instructed his staff to attribute Medicare and Medicaid claims to providers other than Respondent Petrus, even if Dr. Petrus provided the items or services. I find this testimony to be credible and essentially uncontradicted by any evidence offered by Respondents.

The evidence belies Respondents' assertions that claims were submitted negligently or that Respondent Petrus' instructions were misunderstood by his staff. The evidence establishes that between May 1983 and January 1984, certain individuals confronted Respondent Petrus with the fact that Medicare and Medicaid claims were being falsely attributed to physicians other than Respondent Petrus. Respondent Petrus' response to this information confirms that he ordered his staff to present false claims, and that he was comfortable with the results of his directives.

On two occasions, Dr. Malsky told Respondent Petrus that claims were being presented which falsely represented Dr. Malsky as the provider of items or services. Dr. Malsky personally confronted Respondent Petrus with this evidence and, subsequently, had his attorney complain to Respondent Petrus in writing. The attorney explicitly told Respondent Petrus that claims which falsely represented Dr. Malsky as the provider of items or services were being unlawfully presented.

In his conversation with Dr. Malsky, Respondent Petrus stated that it was irrelevant which physician was claimed as the provider, because all claims were being billed to Respondent Eye Center. Finding 171. This statement by Respondent Petrus amounted to admission of the scheme. Respondent Petrus also responded to the letter from Dr. Malsky's attorney by attempting to shift responsibility for identifying false claims to Dr. Malsky, and by blaming the staff at Respondent Eye Center for any false claims. He made no effort to correct his staff. Indeed, Respondents continued to file claims which falsely attributed Dr. Malsky as the provider of items or services.[9]

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[9] Respondents now contend that Dr. Malsky is responsible for any false claims attributable to Respondents. This allegation is unsupported.

Respondent Petrus would have had no reason to alter records and suborn perjury if, as Respondents now aver, the claims were submitted in error. Respondents' present arguments also ignore the fact that Respondent Petrus admitted the scheme to defraud Medicare and Medicaid in pleading guilty to fraud and obstruction of justice. Findings 200-201.

Finally, I consider it significant that Respondent Petrus elected not to testify in this case to deny the massive evidence of his fraud and dishonesty which was presented by the I.G. Under the circumstances, it is reasonable for me to infer that he did not testify, because he could not credibly deny the evidence.

Respondents also argue that the I.G. failed to prove that the items or services at issue were provided by, or at the direction of, Respondent Petrus. Respondents' assert that the I.G.'s case was, in large measure, based on the I.G.'s argument that individual physicians only provided that which they recorded in treatment records. According to Respondents, Drs. Malsky and Baer were poor record keepers who frequently did not record services which they actually rendered. Respondents assert that these services were never recorded or recorded after the fact by Respondent Petrus or by an employee. Therefore, according to Respondents, no credible case can be made as to which physician provided which item or service.

I disagree with Respondents' assertions. First, many of the claims at issue attribute the items or services to Respondent Petrus. Findings 54-55. These claims are admissions by Respondents that Respondent Petrus was the provider, and there is no evidence of record which contradicts these admissions. Second, a great number of claims are for items or services which were provided on dates when neither Drs. Malsky nor Baer worked at Respondent Eye Center or for Respondent Petrus at Bailey Square. Findings 60-62, 65-67. Respondent Petrus was the only other physician who could have provided these items or services on the dates in question.

The rest of the claims were individually testified to by Drs. Malsky and Baer. They credibly testified, both from their own memories and from the documentation of the treatments upon which the claims were based, that they did not provide the items or services which were attributed to them in the claims. Dr. Malsky credibly testified that he routinely recorded his treatments and the items and services he provided. Dr. Baer credibly testified that he meticulously recorded all of his participation with patients, except in the case of a few

surgeries which he performed at Bailey Square [10]. No witness or document refuted Dr. Malsky's or Dr. Baer's testimony that specific items or services were not provided by them.

As with the other claims at issue, the only other physician who could have provided the items or services falsely attributed to Drs. Malsky and Baer was Respondent Petrus. It is reasonable to conclude that, to the extent that these items or services were provided, Dr. Petrus provided them.

a. Violation of section 1128A(a)(1)(D).

Section 1128A(a)(1)(D) of the Act makes it unlawful for a party to present or cause to be presented claims for items or services that are furnished during a period when a person was excluded (or, under previous versions of section 1128, suspended) from participation in Medicare or Medicaid.[11] This section does not require proof of a party's culpability as an element of liability. On its face, the section embodies a strict liability standard of violation.

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[10] One witness testified that Dr. Malsky sometimes failed to complete patient charts. Tr. at 1196. However, this witness could not state how frequently this happened. The witness also testified that Dr. Malsky frequently failed to complete office records known as "superbills." Tr. at 1196. However, superbills are claims records, not treatment records. Dr. Malsky's and Dr. Baer's testimony was reinforced by reference to treatment records, not by reference to superbills.

[11] Prior to 1987, the law read somewhat differently. The earlier version of the law proscribed, at section 1128A(a)(1)(B), that a party presenting or causing to be presented a claim for items or services, "payment which may not be made under the program under which such claim was made." The 1987 revision did not change the intent or scope of the law, except to include within the proscription claims by beneficiaries or recipients made at the direction of an excluded party. See H.R. Rep. No. 100-85 (Part 2), 100th Cong., 1st Sess. (1987) at 14-15.

Respondents presented or caused to be presented all 271 claims in violation of section 1128A(a)(1)(D) and its predecessor.[12] The evidence establishes that Respondent Eye Center actually presented the claims. Findings 28-29. Respondent Petrus, by directing Respondent Eye Center to present the claims, caused the claims to be presented. Finding 31. All 271 claims are for items or services which were provided by Respondent Petrus. Findings 54-152. All of the items or services for which reimbursement was claimed in the 271 claims were claimed to be provided during a period when Respondent Petrus was suspended.

b. Violation of section 1128A(a)(1)(A).

Section 1128A(a)(1)(A) of the Act makes it unlawful for a party to present or cause to be presented claims for items or services where that party knows or should know that the items or services were not provided as claimed.[13] The 174 claims which falsely represented that either Dr. Malsky or Baer provided the items or

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[12] On February 6, 1990, I entered partial summary disposition against Respondent Petrus with respect to six of the 271 claims at issue in this case. That Ruling was issued pursuant to 42 C.F.R. 1003.114(c). I concluded that, with respect to the six claims, there had been a prior final determination, in the form of Respondent Petrus' guilty plea to criminal charges of Medicare or Medicaid fraud involving these claims. I have also made findings based on the evidence concerning these six claims. There exists independent proof that these claims were presented or caused to be presented in violation of the Act. The six claims are enumerated at counts 83-86 and 203 and 204 of Attachment 1 to the I.G.'s Posthearing Brief.

[13] Prior to December 22, 1987, this section's standard of liability for a party who filed a false claim was couched in terms of whether the party knew or had reason to know the item or service was not provided as claimed. On December 22, 1987, Congress retroactively substituted the "should know" standard for the "reason to know" standard. No court has decided the validity of Congress' retroactive application of the "should know" standard to claims for items or services presented prior to December 22, 1987. In light of this unresolved issue, I use the "knows" and "should know" standard of the 1987 revision, as well as the pre-revision "has reason to know" standard, to decide Respondents' liability under section 1128A(a)(1)(A).

services for which reimbursement was claimed were presented or caused to be presented in violation of this section.

As is noted above, Respondents either presented these claims or caused them to be presented. They were all materially false, in that they claimed that a physician other than Respondent Petrus provided the items or services for which reimbursement was claimed. Therefore, the only remaining question is whether Respondents manifest culpability necessary to establish a violation.

The evidence establishes that Respondents knew that the items or services represented by these 174 claims were not provided as claimed. A party "knows" that an item or service is not provided as claimed when he or she knows that the information that he or she is placing or causing to be placed on a claim is untrue. Tommy G. Frazier and Prater Drugs, DAB Civ. Rem. C-127 (1990); Anesthesiologists Affiliated et al. and James E. Sykes, D.O. et al., DAB Civ. Rem. C-99, C-100 (1990); Thuong Vo, M.D. and Nga Thieu Du, DAB Civ. Rem. C-45 (1989). It is not necessary for a respondent to personally make a false claim in order to satisfy the "knows" test. All that is necessary to satisfy the test is that a respondent issue instructions concerning the preparation of claims which he or she knows will result in the inclusion of false information in the claims.

Here, the evidence establishes that Respondent Petrus instructed staff at Respondent Eye Center to attribute items or services to Drs. Malsky and Baer in circumstances where Respondent Petrus knew that those physicians could not possibly have provided the items or services. The evidence also establishes that Respondent Petrus instructed his staff to alter claims to falsely show that physicians other than him had provided the claimed items or services. Finally, the evidence establishes that Respondent Petrus told his staff to withhold filing claims for items or services provided by him until they could be falsely attributed to Dr. Malsky. These directives by Respondent Petrus account for all 174 of the false claims.

Respondent Eye Center is as culpable as Respondent Petrus. The evidence establishes that Respondent Petrus was the alter ego of Respondent Eye Center. It was an entity entirely owned and directed by him. For all practical purposes, its actions were Respondent Petrus' actions. The Eye Center's role in the scheme was to function as the executor of Respondent Petrus' designs.

It also served, when convenient, as a shield to deflect responsibility from Respondent Petrus.

Although I have concluded that Respondents knew that the items or services in the 174 claims were not provided as claimed, the evidence also establishes, alternatively, that Respondents had reason to know that the items or services were not provided as claimed. The "reason to know" standard contained in the Act prior to December 22, 1987, created a duty on the part of a provider to prevent the submission of false claims where: (1) the provider had sufficient information to place him, as a reasonable medical provider, on notice that the claims presented were for items or services not provided as claimed, or (2) there were pre-existing duties which would require a provider to verify the truth, accuracy, and completeness of claims. Frazier and Prater Drugs, supra; Anesthesiologists Affiliated, supra; Vo, supra; George A. Kern, M.D., DAB Civ. Rem. C-25 (1987).

Respondents knew that instructions Respondent Petrus had given to employees at Respondent Eye Center concerning the manner in which claims were to be filed would inevitably result in the presentation of false claims. Therefore, Respondents had information to place them, as medical providers, on notice that the 174 claims were for items or services not provided as claimed.

Finally, the evidence establishes that Respondents should have known that the 174 items or services were not provided as claimed. The broadest standard of liability under the Act is "should know." This standard subsumes reckless disregard for the consequences of a person's acts. It subsumes those situations where a respondent has reason to know that items or services were not provided as claimed. "Should know" also subsumes negligence in preparing and submitting or in directing the preparing and submitting of claims. Mayers v. U.S. Dept. of Health and Human Services, 806 F.2d 995 (11th Cir. 1986), cert. denied, 484 U.S. 822 (1987); Frazier and Prater Drugs, supra; Anesthesiologists Affiliated, supra; Vo, supra.

Inasmuch as Respondents had reason to know that the 174 claims were false, they also should have known that they were false. Even if the evidence were considered in a light most favorable to Respondents, it would establish a cavalier indifference to the truthfulness of their claims which exceeds ordinary negligence.

Although the Act makes an employer liable for the negligence of his employee, I am not finding that

Respondents' employees were negligent. Responsibility for these claims lies solely with Respondents.

6. Assessments and penalties are appropriate in this case.

The remedial purpose of the Act is to protect government financed health care programs from fraud and abuse by providers. Mayers, supra, 806 F.2d at 997; Frazier and Prater Drugs, supra, at 23; Anesthesiologists Affiliated, supra, at 58; Vo, supra, at 22. The assessments and penalties provisions of the Act are designed to implement this remedial purpose in two ways. One is to enable the government to recoup the cost of bringing a respondent to justice and the financial loss to the government resulting from the false claims presented by the respondent. The other is to deter other providers from engaging in the false claims practices engaged in by a particular respondent. Mayers, supra, at 999; Frazier and Prater Drugs, supra, at 23; Anesthesiologists Affiliated, supra, at 58; Vo, supra, at 22.

The Act and implementing regulations provide that a penalty of up to $2,000.00 and an assessment of not more than twice the amount claimed may be imposed on a respondent for each item or service which is presented in violation of the Act. Social Security Act, section 1128A(a); 42 C.F.R. 1003.103, 1003.104. The maximum penalties which I may impose against Respondents are $542,000.00, based on the 271 claims they presented for payment in violation of the Act. The maximum assessments which I may impose exceed $80,000.00, based on the dollar amount claimed in the 271 claims.

Regulations prescribe that, in determining the amount of penalties and assessments, I may consider, as nonbinding guidelines, factors which may be either mitigating or aggravating. These include: (1) the nature of the claim or request for payment and the circumstances under which it was presented, (2) the degree of culpability of the person submitting the claim or request for payment, (3) the history of prior offenses of the person submitting the claim or request for payment, (4) the financial condition of the person presenting the claim or request for payment, and (5) such other matters as justice may require. 42 C.F.R. 1003.106(a).

A respondent has the burden of proving the presence of mitigating factors, including financial hardship. 42 C.F.R. 1003.114(c). The regulations provide that, in cases where mitigating factors preponderate, the penalties and assessments should be set correspondingly

below the maximum permitted by law. 42 C.F.R. 1003.106(c)(1). The regulations also provide that, in cases where aggravating factors preponderate, the penalties and assessments should be set close to the maximum permitted by law. 42 C.F.R. 1003.106(c)(2).

The Act has been interpreted to permit imposition of penalties and assessments which exceed the amount actually reimbursed to a respondent for items or services which were unlawfully claimed. Chapman v. U.S. Dept. of Health & Human Services, 821 F.2d 523 (10th Cir. 1987); Mayers, supra, 806 F.2d at 99. This reflects the legislative conclusion that activities in violation of the Act "result in damages in excess of the actual amount disbursed by the government to the fraudulent claimant." Mayers, supra, 806 F.2d at 999.

I impose assessments of $80,000.00 and penalties of $100,000.00 against Respondents, jointly and severally. These remedies will adequately compensate the government for the damages caused by Respondents. The penalties, will, in combination with other factors which I shall discuss, provide a reasonable deterrent.

a. Assessments.

The damages caused by Respondents are measurable in several ways. Respondents unlawfully claimed more than $40,000.00 from Medicare and Medicaid. Although the I.G. did not prove the precise amount which Respondents obtained from these unlawful claims, Respondents received substantial reimbursement to which they were not entitled.[14]

The government devoted substantial efforts to bringing Respondents to justice. Evidence adduced at the hearing established that an I.G. employee spent many days developing evidence of Respondents' violations. Finding 225. There were many other federal employees whose time

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[14] The evidence shows that more than $20,000.00 was paid by Medicare and Medicaid as reimbursement for these claims. However, some of these funds were paid into a special account which held payments for claims to suspended providers in escrow. These funds were not obtained by Respondents and were not lost by the government. The I.G. did not explain how much of the reimbursement was paid to Respondents and how much was paid into the special account.

and resources were consumed by the investigation which led to the bringing of this case.[15]

Perhaps most significant is the inchoate damage which Respondents' misconduct caused to the integrity of the Medicare and Medicaid programs. Respondents' scheme was designed to neutralize those mechanisms established by Congress to protect the integrity of the Medicare and Medicaid. Respondents manifested utter contempt for these mechanisms and for the individuals charged with administration and enforcement of them. This contempt is graphically demonstrated by the evidence in this case. Almost simultaneous with his entering into a settlement of the I.G.'s original suspension case against him, Respondent Petrus was implementing a scheme to thwart the suspension.

Respondents argue that no actual damage was suffered as a consequence of their fraud. They premise this argument on their claim that the I.G. failed to prove that any of the items or services for which Respondents claimed reimbursement were not provided to patients. However, Medicare and Medicaid were not required to pay for these items or services, regardless whether they were provided by Respondents. The consequence of Respondent Petrus' suspension was that no Medicare or Medicaid items or

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[15] Subsequent to the hearing, the I.G. offered additional evidence to prove that substantial costs were incurred in prosecuting the case against Respondents. The I.G. also sought to obtain and offer evidence as to the time and resources spent on this case by me and other Departmental Appeals Board employees. I denied the I.G's request for Departmental Appeals Board cost information because I concluded that such information was not relevant to the issue of cost. I premised my denial on my conclusion that Congress did not intend that respondents be taxed with the costs of exercising their rights to hearings under section 1128A. I am also denying the I.G.'s motion to supplement the record with additional evidence as to the efforts devoted to the case by government employees. This evidence is irrelevant to the extent that it relates to the costs of this case, as opposed to the investigation which preceded it. I also conclude that it would not be in the interests of justice to introduce this evidence at this time. Were I to introduce such evidence I would be obligated to provide Respondents the opportunity to oppose and rebut it. This would in turn necessitate additional on the record proceedings which are unnecessary in light of my ruling as to the relevance of the evidence.

services provided by him would be reimbursed. The government was damaged to the extent it paid for items or services for which it was not required to pay.

My decision as to the assessments I am imposing takes into account the presence of numerous aggravating factors. These factors include: the deliberate fraud committed by Respondents, their contempt for federally funded health care programs and the personnel charged with administering these programs, the fact that Respondent Petrus' fraudulent scheme was his second episode of fraud against a government health care program, the substantial dollar value of the unlawful claims presented by Respondents, and Respondent Petrus' attempts to cover up his fraud.

My decision also takes into account that Respondents failed to prove the presence of any mitigating factors. Respondents offered no evidence as to their financial condition, nor did they offer any exculpatory evidence to explain their conduct.

b. Penalties.

In his notice letter to Respondents, the I.G. requested that I impose penalties totalling $293,500.00. The I.G. now requests that I impose penalties of $500,000.00. The I.G. argues that the penalties he now requests are justified by the many serious aggravating factors proven in this case. He asserts that, given the flagrant nature of Respondents' unlawful conduct and their contempt for the Medicare and Medicaid programs, penalties which approach the maximum permitted by the Act are justified.

I agree with the I.G.'s characterization of Respondents' conduct. These Respondents displayed contempt for the Medicare and Medicaid programs. Respondent Petrus' behavior during the hearing and the content of Respondents' posthearing submissions makes it plain that Respondents continue to manifest this contempt. I could easily justify imposition of the maximum penalties permitted by the Act were I to simply to exact retribution for Respondents' misconduct.

However, the Act is remedial. Its purpose is not to punish, but to protect the integrity of federally funded health care programs. The determination of appropriate penalties in particular cases must be based on these remedial considerations, and not on criteria which would normally be used to determine punishment.

As is noted above, one statutory purpose of penalties is to establish a deterrent against future misconduct by respondents or by other health care providers. Penalties in a given case may not be set so high as to exceed that which is reasonably necessary to satisfy the statutory purpose. Nor may penalties be imposed without due consideration to the assessments which are imposed simultaneously. The total amount of penalties and assessments in a given case should not be so high as to be grossly disproportionate to the costs incurred by the government as the consequence of unlawful conduct. Otherwise, the penalties and assessments are no longer remedial.

I do not conclude that regulations would direct a different result. The regulations provide nonbinding guidelines to assist the trier of fact in deciding the case. They do not suggest that the remedy in any case brought pursuant to the Act should exceed that which is reasonably necessary to achieve the statutory purpose.

Prior to the inception of this case, Respondent Petrus was convicted of criminal offenses related to some of the claims for items or services at issue here. He was sentenced to nine years imprisonment and fined $55,000.00. Respondent Petrus was subsequently excluded from participating in Medicare and Medicaid for 25 years. Penalties totalling $100,000.00 are reasonable in this case because, when considered in light of sanctions previously taken against Respondent Petrus, the penalties which I am imposing are sufficient to satisfy the remedial objectives of the Act.

The I.G. argues that I should impose penalties without reference to sanctions imposed against Respondents in other forums. He relies on section 1128A(a), which provides that parties who violate the act shall be subject to penalties "in addition to other penalties that may be prescribed by law."

This section does not state that penalties shall be determined <u>without reference</u> to other penalties that may be prescribed by law. It provides the Secretary with independent authority to determine and impose penalties. But that authority is subject to the Act's remedial considerations.

I am not suggesting that there exist mitigating factors here which justify lower penalties than those requested by the I.G. Plainly, none exist. My decision is based on the need to fashion a deterrent which comports with the law's remedial purposes and which, in conjunction

with other sanctions, reasonably relates to the costs sustained by the government. Here, penalties totalling $100,000.00 are adequate when other sanctions and the assessments are considered. Had other sanctions not been imposed, then significantly higher penalties would have been warranted.

7. The penalties and assessments imposed in this case do not violate Respondents' rights not to be placed in double jeopardy.

Respondents argue that the imposition against them of penalties and assessments violates their rights not to be placed in double jeopardy. They premise their argument on Respondent Petrus' 1985 conviction for Medicare and Medicaid fraud and obstruction of justice, and the Supreme Court's decision in United States v. Halper, 109 S. Ct. 1892 (1989).

Respondents contend that the Act is unconstitutional as applied to them. I am without authority to decide the validity of federal statutes or regulations in cases brought pursuant to the Act. 42 C.F.R. 1003.105(c). I make no ruling concerning the constitutionality of the Act as it is being applied to Respondents.

However, I do have authority to rule on the factual premises and contentions of the parties as well as to interpret laws, regulations, and court decisions. I conclude that Respondents' arguments as to the applicability of the Halper decision to the facts of this case are fundamentally incorrect.

The defendant in Halper was convicted in federal court of filing 65 false Medicare claims resulting in an overpayment of $585.00. Defendant was sentenced to two years' imprisonment and fined $5,000.00. Subsequently, the United States Government brought a civil action against defendant under the False Claims Act, a statute which provides for civil remedies of twice the dollar amount of that which is established as falsely claimed, plus penalties of $2,000.00 for each false claim. The government's suit was premised on defendant's conviction for all 65 claims. The district court entered summary judgment in favor of the government on the issue of liability. However, it held that the remedy sought by the government -- penalties totalling $130,000.00 -- would violate the defendant's right against being placed in double jeopardy. The court based its conclusion on its determination that there was a "tremendous disparity" between the civil penalty requested and the actual damages sustained by the government. It concluded that

the disparity was so great as to render the penalty punitive.

The Supreme Court sustained the district court's conclusion that imposition of a $130,000.00 penalty would be punitive in the context of the particular facts of the case. The Supreme Court held that a civil sanction constitutes punishment in those circumstances where the civil sanction serves only the traditional aims of punishment, retribution and deterrence. 109 S.Ct. at 1902. It stated that a civil penalty could operate as an unconstitutional second punishment in:

> the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-guage offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

109 S.Ct. at 1902. The Supreme Court remanded the case to the district court for further proceedings to determine the amount of damages sustained by the government. It also held that, in determining damages, the district court would be permitted to impose a penalty which approximated the damages sustained by the government. The issue was not whether damages were precisely proven, but whether there existed a rational relationship between what was incurred and what was imposed.

The Supreme Court held that its decision was inapplicable to defendants who had not previously been convicted on the same offenses for which civil penalties are sought:

> Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated.

109 S.Ct. at 1903 (emphasis added).

The Halper decision is inapplicable to this case for several reasons. First, only Respondent Petrus sustained a prior criminal conviction. Respondent Eye Center was not charged with, nor convicted of, any criminal offenses. Thus, the Double Jeopardy Clause is not implicated with respect to Respondent Eye Center.

Second, Respondent Petrus was convicted on only six of the 271 claims which comprise this case. The Double Jeopardy Clause is not implicated with respect to the remaining 265 claims.

Respondents assert that Respondent Petrus' guilty plea to the six claims amounted to jeopardy on all 271 claims. That is manifestly untrue. The charges to which Respondent Petrus pleaded specifically involved only the six claims. There was no adjudication and no jeopardy concerning anything other than the six claims and a related obstruction of justice charge. Respondent Petrus was sentenced based on his plea and not on unadjudicated charges. I.G. Ex. 108, 109.

As to the six claims, the assessments and penalties which I have imposed are rationally related to the damages sustained by the government. The total amount unlawfully claimed by Respondents for these six claims was $1425.00. I.G. Ex. 21, 69.2. The proportionate share of the total penalties and assessments (6/271 of $180,000.00) attributable to these claims is less than $4,000.00.

Finally, the total penalties and assessments which I impose in this case are remedial and not punitive. There exists a reasonable relationship between the total penalties and assessments and the costs sustained by the government as a consequence of Respondents' misconduct. Therefore, no issue of a second punishment results from the remedies which I have imposed.

CONCLUSION

For the reasons set forth in this Decision, I impose assessments of $80,000.00, and penalties of $100,000.00 against Respondents, jointly and severally.

/s/

Steven T. Kessel
Administrative Law Judge