A New Breed of Whistleblower? Consulting Company Turns in its Own Health Care Client for Alleged False Claims

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A False Claims Bulletin

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On August 19, 2013, the Department of Justice issued a press release announcing that it had entered into a $26 million settlement with Florida-based Shands Healthcare (Shands) to resolve allegations that six of Shands' facilities submitted false claims to Medicare, Medicaid and other federal health care programs for inpatient services that should have been billed as outpatient services.

The issue of inpatient versus outpatient billing is obviously not a new one for our hospital clients. However, the allegations in the complaint in this particular case are striking, as the whistleblower who brought these allegations to the government's attention and who stands to be awarded millions for his part in uncovering the alleged fraud was the president of a consulting company providing services to Shands.

While Shands admitted no wrongdoing as part of the settlement (as is typical in these settlements), the facts alleged in the unsealed complaint are quite detailed and are worth a read to understand how the conduct at issue in this case rose to the level of false claims rather than merely resulting in an overpayment.

A summary of the facts is as follows:

> Shands operates a network of health care providers in Florida, including the six hospitals included in this settlement. In 2006, Shands issued a Request for Proposals (RFP) seeking to engage a consultant to do an on-site review of its Medicare and commercial insurance billing for observation services and one-day inpatient stays at the six hospitals. Following the RFP process, Shands hired YPRO

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Corporation (YPRO) to do the review on its behalf.

According to the complaint, YPRO's auditors found significant error rates and compliance issues with respect to Shands's observation and inpatient billing practices at all six facilities, including lack of evidence of medical necessity for inpatient admission, lack of documentation by physicians in the patient records, lack of admission orders, overbilling of observation hours, and the complete absence of a case management function at several of the hospitals and the lack of appropriate case management protocols at the other hospitals (including one hospital where case managers had authority to change physician orders).

The complaint alleges that these findings and YPRO's concerns related to the findings were shared with Shands's Interim Chief Compliance Officer, upper management, and department heads at an exit conference. According to the complaint, the YPRO auditor observed "nervous laughter" and comments about "going to jail and wearing striped jumpsuits" at the exit conference, where attendees did not express surprise at the findings and acknowledged the absence of case management protocols at one of the hospitals involved in the audit. YPRO recommended that Shands self-disclose the billing issues to the government and refund the overpayments that were identified during the 2006 audit. However, although the Shands's corrective action plan called for appropriate "adjustments" for overpayments identified during the 2006 audit, YPRO never saw any indication that Shands had refunded the overpayments identified by YPRO.

The unsealed complaint goes on to allege that in December 2006, Shands engaged YPRO to

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> do a follow-up audit of Shands's observation services and one-day inpatient stays. At that time, Shands's Interim Chief Compliance Officer told YPRO's President, Terry Myers, that he deferred to Shands's general counsel on the decision to self-disclose in connection with the 2006 audit findings. The 2007 follow-up audit began in April 2007, and showed results even worse than the 2006 audit, with higher error rates and a 100 percent increase in overbilled units of observation services. Following conclusion of the audit, in early 2008, YPRO's President Myers attempted to contact Shands's new chief compliance officer, who expressed no interest in further follow-up work by YPRO.

In April 2008, YPRO's president filed the qui tam (whistleblower) action against Shands alleging that it defrauded the United States and the State of Florida by submitting false claims for inpatient and observation services (among other allegations). Five and a half years later, the case has now settled, with Shands paying $26 million to resolve its liability to the United States and to the State of Florida.

When the announcement of this settlement was first made, it did not seem particularly noteworthy, especially given the number of Office of Inspector General (OIG) audits going on that involve inpatient versus outpatient/observation status and the recent final rule issued by the Centers for Medicare & Medicaid Services (CMS) on the topic that was published the same day that the settlement was announced. But what is noteworthy about this case is that the president of the consulting company hired by Shands to help the hospitals is the whistleblower who stands to gain, possibly millions of dollars, from turning in his client.

What are the lessons to be learned from the Shands case? Potential whistleblowers are everywhere. If your litmus test for assessing the risk of a particular compliance issue is "who knows about it that could become a whistleblower," the answer just got a little broader. While your knee-jerk reaction to the Shands case might be to include a provision in future consulting agreements prohibiting consulting companies and their officer, directors and staff from reporting suspected violations of law identified during the scope of their contracted work to the Government, such a provision would likely not be enforceable as being contrary to public policy.

So what should you do if you can't just prohibit someone from being a whistleblower? First: hire competent staff and make sure they get the training they need to do their jobs properly. The complaint in the Shands case alleges that hospital

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staff, including case managers and utilization review personnel, did not seem to know or understand the applicable Medicare rules, which likely was the initial cause of many of the errors that became systemic issues.

Second: follow up on concerns expressed internally about compliance issues. There were allegations in the Shands case that upper management and department heads were aware of compliance issues at some of the Shands hospitals prior to the YPRO audit results being shared. Sticking your head in the sand and ignoring concerns can form the basis for a "knew or should have known" allegation under the False Claims Act.

Third: take appropriate corrective action once a compliance issue is identified. Most of the time, that means you should investigate the issue, quantify the overpayment if one exists, and refund the overpayment to the appropriate payor(s). Sometimes, it means making a more formal self-disclosure to the government than just cutting a check or reversing a claim. Following up on the issues and making sure that appropriate corrective action, including the refund or voluntary disclosure, is completed, is essential.

In the Shands case, had YPRO President Myers seen his client doing the right thing after the 2006 and 2007 audits, it's likely that no whistleblower lawsuit would have been filed, and Shands wouldn't be cutting a $26 million check to the government.

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