

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HILDA L. SOLIS,)
Secretary of Labor,)
U. S. Department of Labor,)
) FILE NO. 2:07-CV-00068 RL
Plaintiff,)
)
v.)
)
HARRIS N.A.)
Defendant.)
)

FIFTH STATUS REPORT AND RECOMMENDATIONS OF THE INDEPENDENT
FIDUCIARY FOR MY SMART BENEFITS INC. TRUST FOR OUTSTANDING CLAIMS

On January 19, 2010, the Independent Fiduciary filed her Fourth Status Report (D.E. #118) outlining events that had occurred in connection with the processing of claims since the Court's December 8, 2008 Opinion and Order regarding the Independent Fiduciary's Revised Plan of Distribution (D.E. #81). This constitutes the Independent Fiduciary's Fifth Status Report to update the Court on her progress since her Status Report of January 19, 2010 and to report her review of issues raised by Mr. Hogge and her recommendations on these matters.

BACKGROUND

On March 8, 2007, a Consent Order between the Plaintiff and Defendant was entered appointing Jeanne Bryant as the Independent Fiduciary of the My Smart Benefits Inc. Trust For Outstanding Claims. The Independent Fiduciary was supplied with 884 claims

for unreimbursed dental or vision services. With additional review, 893 claims were reviewed. The gross total was \$460,828.57. After adjudication with the information held, the payable claim amount totaled \$271,577.91. On August 13, 2007, the Independent Fiduciary submitted her first Plan of Distribution (D.E. 9). During the pendency of that proposal, the Independent Fiduciary heard from a number of claimants not represented in her adjudications. The Independent Fiduciary reported this to the Court (D.E. #16 and D.E. #20). With assistance from the U.S. Department of Labor, additional claims were received from participants in the My Smart Benefits dental programs. Those additional claims were adjudicated.

On February 13, 2008, the Independent Fiduciary filed her Revised Plan of Distribution (D.E. 20). The gross total of unreimbursed claims grew to \$618,939.00. The adjudicated payable amount grew to \$404,357.71. On February 26, 2008, Mr. Hogge and My Smart Benefits, Inc. filed objections and motions to intervene. Objections were also filed by Direct Benefits, LLC and Daniel Dixon as to the treatment of third-party claimants.

The Court ruled on these objections in its Order of December 8, 2008 (D.E. 81) by rejecting the Revised Plan of Distribution, rejecting the treatment of third-party claimants, and ruling that employer balances should not be taken into consideration when determining the amount due on unreimbursed claims.

ACTIONS SINCE THE COURT'S DECEMBER 8, 2008 ORDER

The Court's Order stated as follows:

"...the Independent Fiduciary is DIRECTED to utilize the benefit information developed by Hogge to more accurately adjudicate submitted claims; and Hogge is ORDERED to promptly provide the Independent Fiduciary supporting bank and accounting information to verify and validate the prior claims history used by him to adjudicate the claims submitted to the Independent Fiduciary." (D.E. #81 at page 13)

Since the Court's Order, the Independent Fiduciary has submitted 4 previous status reports outlining the progress of the Independent Fiduciary toward filing her Second Revised Plan of Distribution. The First Status Report (D.E. # 94) outlined the first meeting after the Court's Order with Mr. Hogge.¹ This meeting took place on February 5, 2009. At that visit, Mr. Hogge produced a sizeable amount of information as outlined in the First Status Report. The Independent Fiduciary asked Mr. Hogge to provide evidence of prior paid claims, plan document information, benefit outlines, and census data.

In her Second Status Report, (D.E. #100) the Independent Fiduciary noted she had completed 50% of the processing. The Second Status Report noted that the information being provided by Mr. Hogge in connection with evidence of prior paid claims did not denote who the claim was being paid for (the member, spouse, or dependants). Each person covered by the MSB plans has his/her own annual benefit limit. Further, as previously reported by the

¹ The Independent Fiduciary or a member of her staff has met with Mr. Hogge at the Independent Fiduciary's office on three (3) occasions.

Independent Fiduciary, the MSB plans used a cumulative formula during a plan year to determine the payable amount of a claim.

In the Third Status Report, (D.E. #106) the Independent Fiduciary reported she had completed the processing, informed the Court and parties the methods used to adjudicate claims, and that the remaining tasks were to gather from participants proof of payment of the subject claims.² No objections were received as to the Independent Fiduciary's procedure of claims processing.

As of the filing of the Third Status Report, the Independent Fiduciary had completed the adjudication of submitted billed charges. The adjudicated total decreased to \$352,676.03 on 1,349 claims.³ On August 15, 2009, the Independent Fiduciary issued to members of the My Smart Benefit Plan notice of the amount adjudicated and collected proof of payment information from those members whose documentation does not include such proof.

Members had 30 days within which to respond, providing the requested information and/or submitting to the Independent Fiduciary objections to the notice. 655 members responded providing requested information. Some of these members also provided documentation regarding additional claims that were not provided earlier to the Independent Fiduciary and some objected to the processed amount of their claim, submitting supporting

² All MSB dental or vision plans are reimbursement plans. This requires the covered person to pay the dental or vision service and submit to MSB proof of such payment as a condition of reimbursement, along with an applicable medical service form (ADA or Optometric).

³ The original adjudications (Class 2 and Class 3) submitted by the Independent Fiduciary in February, 2008, totaled approximately \$404,000.00.

documentation regarding their objection. The Independent Fiduciary resolved all objections from members and completed all processing on November 1, 2009. On that date, as a result of resolving claimant objections and receiving responses from claimants establishing proof of payment, the gross adjudicated payable from the Trust was \$273,502.36.

As noted in her Fourth Status Report, the Independent Fiduciary was proceeding to finalize her Second Revised Proposal to Distribute Assets, when she received a request from counsel for Jonathan Hogge to review the processing database. A copy of the completed processing database was forwarded to J. Michael Katz. Through counsel, Mr. Hogge then requested an on-site review of the completed processing prior to submission to the Court. That review took place on November 30 and December 1, 2009.⁴

Mr. Hogge reviewed with Mr. Robert Moore, Jr. of Receivership Management Inc. the claims of 103 members. The Independent Fiduciary understands that Mr. Hogge did not complete his review during the two days and has some 300 additional members he would like to review.

At this review, Mr. Hogge raised several objections to the processing of the Independent Fiduciary. Significantly, one of the objections placed by Mr. Hogge is a general objection to the

⁴ It had been anticipated that the review would be conducted in the month of November. However, due to a medical issue on Mr. Hogge's part and the Independent Fiduciary's Chief Operations Officer, Robert E. Moore, Jr. having the H1N1 flu, the review did not take place until November 30 and December 1, 2009.

method used to process claims with prior claims history.⁵ This method is outlined below in footnote five and was outlined in the Independent Fiduciary's Third Status Report.

The basis of Mr. Hogge's objection is that information which would indicate for what particular claim a prior claim check was issued does exist and the information is in the possession of the U.S. Department of Labor. After inquiry by the Independent Fiduciary, the U.S. Department of Labor had determined there was information that was in their possession that may have EOB information.⁶

ADDITIONAL INFORMATION REVIEW

On January 13, 14, and 15 of 2010, Mr. Moore traveled to the Chicago Regional Office of the Employee Benefits Security Administration of the U.S. Department of Labor (hereafter referred to as "DOL"). He also traveled on January 14 and 15 to Hammond, Indiana to review DOL held documents at the Office of the U.S. Attorney for the Northern District of Indiana. On this trip, Mr. Moore reviewed a total of 81 boxes during the three-day

⁵ From the documents submitted to the Independent Fiduciary, a database was created listing the state of the employer, the employer name, the member's name and address, the dates of service, the provider's name, the billed amount, the first adjudicated amount, the amount Mr. Hogge had adjudicated (if any), the final adjudicated amount, and the reasons behind the adjudication. The submitted documentation was reviewed to determine the date of service, the type of service, the provider, and the billed charge. The group application or plan document or summary plan description (provided by Mr. Hogge) was examined for coverage and applicable claim calculations. Prior claims payments were taken into effect, using cancelled checks (provided by Mr. Hogge) if applicable to the claim. Where a cancelled claim check was submitted for the plan year applicable to the claim, the amount of the check was used in the calculation of the cumulative benefit. Where the claim check did not indicate which family member the claims check was for, the Independent Fiduciary applied the check to the employee member and not to the employee member's dependent or spouse. Then the cumulative calculations applicable to the plan design were utilized and the resulting figure entered as the final adjudication amount. It is this portion of the claims processing Mr. Hogge objects as he believes information exists to make the adjudication more accurate.

⁶ An EOB is an Explanation of Benefits letter sent by MSB to the participant/member explaining the determination of how the benefit amount payable was computed.

trip.⁷ A representative of the DOL, Mr. Hogge, and counsel for Mr. Hogge were present during the entire review. The review resulted in gathering fifty (50) files (104 megabytes) of potentially relevant material. This included EOB's, Plan Documents, MSB operational documents, and benefit plan outlines.

Based on Mr. Moore's review, the number of applicable EOB's discovered as compared to the total amount of material held by either the DOL or the U.S. Attorney's office was substantial, but not significant.⁸ Mr. Hogge during the review indicated that MSB in its operations began using QuickBooks and Microsoft Word to generate EOB documents. Then in early 2003, MSB continued to use the QuickBooks, but also used a system called Appoline and a third system.⁹ Based on Mr. Hogge's explanation, for the period after March in 2003, Mr. Moore would not find EOB's because the Appoline system maintained the EOB electronically and paper copies were not kept. Mr. Hogge has represented that the computer server on which the Appoline claim information was maintained was lost, as well as the back-up tapes. In order to utilize claim information from the post-March 2003 period, claim checks and claims would have to be manually associated and possibly processed.

IMPACT OF DOL CHICAGO/HAMMOND DOCUMENTS ON CLAIMS PROCESSING

⁷ Forty-one boxes were reviewed at DOL Chicago Offices; forty boxes were reviewed at the U.S. Attorney's office in Hammond.

⁸ Most of the gathered EOB information was on 2002 claims and a small number of EOBs were on 2003 claims.

⁹ According to Mr. Hogge, this third system failed completely and was abandoned not long after it was first used.

During the months of January and February, 2010, the Independent Fiduciary took the information gathered at the DOL offices and reviewed the gathered documents to determine if the information was applicable to the claims present, and if so, reprocessed those claims in an effort to determine the result of this additional information. This effort was sizeable and complex since it essentially required re-processing of submitted claims when information was applicable.

Of the EOB documents gathered, 204 EOB's were applicable to the 852 claims determined by the Independent Fiduciary to be payable. 126 EOB's were found inapplicable to the claims determined by the Independent Fiduciary to be payable. The result would indicate \$15,180.83 in claim amount write-downs and \$8,713.60 in claim amount write-ups. The average write-down was \$107 per affected claim. The average write up was \$161.36 per affected claim. The total expense of the investigation of Mr. Hogge's allegation, the gathering of documents and reprocessing was \$8,665.76.

RECENTLY SUPPLIED ADDITIONAL INFORMATION FROM HOGGE

On March 22, 2010, Mr. Hogge supplied additional information consisting of scans of ADA forms and checks (some cancelled-some not) as an indication of prior claims of any participant that was in the My Smart Benefits program in 2002 and 2003. This was done as a follow up effort by Mr. Hogge to provide additional prior claim information, ostensibly for those claims for which EOB's were in electronic form only and are not

available. Over 650 claims might be impacted by this information that was supplied at this on-site meeting at the offices of Receivership Management Inc.

**MR HOGGE REPORTS HE HAS FURTHER ADDITIONAL DOCUMENT REVIEW WHICH
MAY PRODUCE MORE PRIOR PAID CLAIMS INFORMATION**

Mr. Hogge reports he has been provided an additional nearly 14,000 pages of documents which may yield further additional paid claim information.

**RECOMMENDATIONS OF THE INDEPENDENT FIDUCIARY REGARDING THE USE OF
ADDITIONAL INFORMATION IN PROCESSING**

Throughout this project, Mr. Hogge has sought to provide the information that would make the processing more accurate. In fact, prior to November 30, 2009, Mr. Hogge has provided six submissions of information which included checks and other information for prior paid claims.

Since no objection was received from Mr. Hogge after the filing of the Third Status Report in August, 2009, it was with a total surprise that Mr. Hogge in November, 2009 raised the objection that claims processing was inaccurate and additional information was still to be had or provided. Had the Independent Fiduciary known that EOB information that had not been submitted to her but was available, the Independent Fiduciary would not have proceeded to notify claimants of adjudicated amounts and resolved objections from those claimants.

In August of 2009, it was the Independent Fiduciary's understanding that Mr. Hogge and the DOL had provided to her

information that each had that would address the Court's order.¹⁰ While the Independent Fiduciary is without knowledge as to when or how Mr. Hogge gained access to information he provided to her, it appears that as Mr. Hogge was able to gather the information, scan and review it, he provided it to the Independent Fiduciary. And with his last submission in July of 2009, the Independent Fiduciary finalized her processing.

With the November 30, 2009 revelation that additional information had not been provided, the Independent Fiduciary was compelled to review what had not been provided. Her review indeed indicated there were 204 claims impacted by the additional information.

After receiving the January 2010 DOL provided information, and receiving from Mr. Hogge on March 22, 2010 documents potentially impacting 650 claims (some of which are among the 352 already reviewed but now potentially further impacted), and having been notified by Mr. Hogge that an additional review of nearly 14,000 documents may generate further impacted claims, the Independent Fiduciary is faced with a decision: a) Utilize the new information and reprocess the claims; or b) Not utilize the new information.

ISSUES PRESENTED IF THE ADDITIONAL INFORMATION IS UTILIZED

1. The additional information will require reprocessing of impacted claims.

¹⁰ Requests to the DOL were made in the fall of 2007. Mr. Hogge's last submission of information was on or about July 1, 2009.

2. Claimants will have to be notified of new re-processed amounts.

3. Under the MSB plan, claimants receiving a write-up will be able to take advantage of the higher amount only if they have proven that their paid amount is higher.¹¹

4. The additional processing and review will cause the Trust to incur additional expenses. The bill for reprocessing the claims for the DOL supplied information in January 2010 was nearly \$5,000.00. Additional processing costs for the 650 could be another \$7,500-\$10,000. Because Mr. Hogge has not reviewed and not identified the number of claims impacted from the 14,000 documents, it cannot be estimated how much reprocessing would be triggered.

5. The additional processing, review, and claimant notification will cause additional delays in issuing claim payments. It took approximately 4 weeks to review the documents provided by the DOL, determine if they were applicable to the claim submitted to the Independent Fiduciary, and then reprocess the claim.

ISSUES PRESENTED IF THE ADDITIONAL INFORMATION IS NOT UTILIZED

1. Claimants may receive more or less money than they are entitled to receive under the Plan. While the Independent Fiduciary believes the processing to be substantially more accurate than that which was presented to the Court in February

¹¹ Those claimants receiving write-ups will not be allowed to claim these amounts under the MSB plans because the plans limit the claimant to the amount actually paid by the claimant. No claimant impacted by the DOL provided information receiving a write-up paid the higher amount.

2008, there is still inaccuracy due to the lack of verifiable information from Mr. Hogge at the time of processing.

RECOMMENDATIONS

The Independent Fiduciary does not believe any additional expense for re-processing is justified in light of the overall impact the January-DOL provided information had on processing. Having already spent an additional \$8,665.76 to investigate the additional information, plus the additional expense to inform claimants, plus additional expense to reprocess 652 claims, and the additional expense to reprocess whatever Mr. Hogge generates from his review of 14,000 documents, it would appear that the expense of this activity would exceed the potential reductions in claim payments. This is especially important with Trust assets now at less than \$200,000.

To illustrate the point, as noted earlier, 204 EOB's generated \$15,180.83 in claim amount write-downs and \$8,713.60 in claim amount write-ups. That would leave a net reduction in claims payable amounts (but before adjustments for expenses) of \$6,467.23. Actual expenses incurred to date on the January 2010 DOL information are \$8,665.76. It is estimated that notification to claimants and resolving objections might cost an additional \$2,000-\$3,000. That would total to \$11,665.76. Netting this expense against the savings of \$6,467.23 leaves a negative impact of \$5,198.53.¹² Even if none of the write-ups were given, the

¹² It is important to note that the claims payable amount will not be paid dollar for dollar as there are insufficient assets to cover that amount; whereas expenses are paid at a dollar for dollar rate.

Trust is not positively impacted greatly.¹³ It is hard to determine what impact Mr. Hogge's March 22nd supplied information would have on 650 claims, possibly less since many of the impacted claims are potentially in the 352 already reviewed. Thus the expense of the additional review would be set off against a lower amount of write-downs, thus not creating savings but potentially costing the Trust. The same would potentially hold true of Mr. Hogge's 14,000 document review.

CONCLUSION

As stated above, the Independent Fiduciary does not recommend utilizing the DOL-EOB information, the March 22, 2010 provided information, or the potential information coming from Mr. Hogge's 14,000 page review because the potential savings to the Trust appear to be exceeded by the potential expenses.

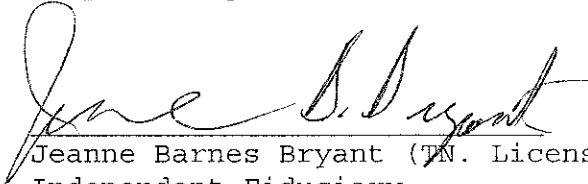
However, should the Court not accept the recommendation of the Independent Fiduciary and determine that the DOL-EOB information should be utilized, as well as the March 22, 2010 provided information, or the potential information coming from Mr. Hogge's 14,000 page review, the Independent Fiduciary is prepared to move forward as quickly as possible with the review and reprocessing.

Therefore, the Independent Fiduciary seeks an Order from this Court, adopting her recommendations regarding the utilization of additional information, and directing her to proceed with the submission of the Second Revised Proposal to

¹³ \$15,180.83 in write downs minus \$11,665.76 in actual and projected expenses equals \$3,515.07.

Distribute Assets, as previously Ordered by the Court. In the alternative, because Mr. Hogge's interests in claims accuracy may be driven by considerations outside of the current proceeding, and in keeping with making the claims processing more accurate, should the Court order utilization of the information developed by Mr. Hogge, the Court may want to consider allowing Mr. Hogge to pay the cost of processing not covered by reductions in amounts payable.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jeanne B. Bryant", is written over a horizontal line.

Jeanne Barnes Bryant (TN. License 5835)
Independent Fiduciary
My Smart Benefits Inc. Trust for
Outstanding Claims
783 Old Hickory Blvd, Suite 255
Brentwood, TN 37027
Telephone: 615-370-0051
Fax: 615-373-4336

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Status Report has been or will be mailed and/or faxed if number available by the 19 day of April, 2010 to all parties noted below:

Peter D. Broitman
Office of the Solicitor
U.S. Department of Labor
230 S. Dearborn Street Room 844
Chicago, IL 60604
Counsel to the Secretary of Labor

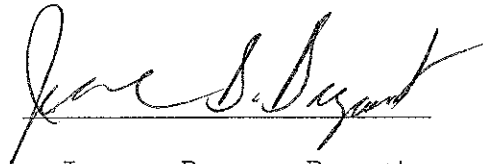
Lawrence W. Schmits
Krieg DeVault LLP
One Indiana Square Suite 2800
Indianapolis, IN 46204-2079
Counsel to Harris NA

Gordon E. Gouveia
Shawn D. Cox
Gouveia & Associates
433 W 84th Drive
Merrillville, IN 46410
Counsel to Jonathan E. Hogge and My Smart Benefits Inc

J. Michael Katz
Law Offices of J. Michael Katz
9013 Indianapolis Blvd
Highland, IN 46322
Counsel to Jonathan E. Hogge and My Smart Benefits Inc

Roger Sandack
170 S Main St Suite 400
Salt Lake City, UT 84101-3636
Counsel to Direct Benefits LLC

BY:



Jeanne Barnes Bryant
Independent Fiduciary