STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TELEVISUAL COMMUNICATIONS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94-6462RP
	)	
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF WORKERS' COMPENSATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a formal hearing in the above-styled case on December 19, 1994, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Michael G. Moore, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is the validity of respondent's proposed rule 38F-53.011.

PRELIMINARY STATEMENT

This is a rule challenge brought under the provisions of Section 120.54(4), Florida Statutes, to challenge the validity of respondent's proposed rule 38F-53.011, which implements the Workers' Compensation training and certification program for health care providers mandated by Section 440.13(3), Florida Statutes.

Here, petitioner, a company that produces educational videos for home, office and self-directed study, complains that the proposed rule only allows a live seminar format, thereby excluding video

correspondence/home study courses, and is therefore an invalid delegation of legislative authority. Specifically, by excluding video correspondence/home study as an acceptable training and certification program under proposed rule 38F-53.011, petitioner contends the agency has exceeded its grant of rulemaking authority; the rule enlarges, modifies or contravenes the specific provisions of law implemented; and, the rule is arbitrary and capricious.1 Respondent denies petitioner's contentions, and further asserts that petitioner lacks standing to challenge the validity of the proposed rule.

At hearing, petitioner called, as witnesses: Gregory L. Wheat, Mark Lettelleir, and Carra Rene Best. Petitioner's exhibits 1-7, 9B-9M, and 13-16 were received into evidence.2 Respondent called, as witnesses: Anna Ohlson, Sandra Ondrus, and Oregon Hunter, M.D. Respondent's exhibits 1-4 and 6-8 were received into evidence.

The transcript of hearing was filed January 13, 1995, and the parties were granted leave until January 23, 1995, to file proposed final orders. The parties' proposed findings of fact, contained in their proposed final orders, are addressed in the appendix to this final order.

FINDINGS OF FACT

The parties

1. Petitioner, Televisual Communications, Inc., is a company specializing in the production of educational and marketing programs for health care. These programs include software, photographic, written media and, pertinent to this case, educational videos for home, office or self-directed study.

2. Respondent, Department of Labor and Employment Security, Division of Workers' Compensation (Division), is the state agency charged by law with the duty to implement and enforce the provisions of Chapter 440, Florida Statutes.

The proposed rule

3. In 1993, the Florida Legislature amended the workers' compensation law, and mandated for the first time that physicians who treat injured workers must be certified by completing a minimum five-hour course in order to receive reimbursement for rendering medical treatment in the workers' compensation system. Section 440.13(3), Florida Statutes (Supp. 1994).

4. Pertinent to this case, Section 440.13(3), Florida Statutes (Supp. 1994), provides:

> (a) As a condition to eligibility for payment under this chapter, a health care provider who renders services must be a certified health care provider and must receive authorization from the carrier before providing treatment. This paragraph does not apply to emergency care. The division shall adopt rules to implement the certification of health care providers.

> As a one-time prerequisite to obtaining certification, the division shall require each physician to demonstrate proof of completion of a minimum 5-hour course that covers the subject areas of cost containment, utilization control, ergonomics, and the practice parameters adopted by the division governing the physician's field of practice. The division shall coordinate with the Agency for Health Care Administration, the Florida Medical Association, the Florida Osteopathic Medical Association, the Florida Chiropractic Association, the Florida Podiatric Medical Association, the Florida Optometric Association, the Florida Dental Association, and other health professional organizations and their respective boards as deemed necessary by the Agency for Health Care Administration in complying with this subsection. No later than October 1, 1994, the division shall adopt rules regarding the criteria and procedures for approval of courses and the filing of proof of completion by the physicians. (Emphasis added)

5. Also pertinent to this case is the Division's general rulemaking authority, codified at Section 440.591, Florida Statutes, which provides:

> The division shall have the authority to adopt rules to govern the performance of any programs, duties, or responsibilities with which it is charged under this chapter.

6. On October 28, 1994, consistent with the legislative mandate and under the rulemaking authority delegated to it by Sections 440.13(3) and 440.591, Florida Statutes, the Division published notice, inter alia, of proposed rule 38F-53.011, in Volume 20, Number 43, of the Florida Administrative Weekly. That rule established the procedures and criteria for the approval of the minimum five-hour training course required for physician certification and, pertinent to this case, provided:

> (7) In order for a certification training course to be approved, the following shall be submitted to the Division as part of the proposed training course:
>
> * * *
>
> (b) Syllabus and outline of course content including time frames for each component and schedules for any breaks or meals included in the presentation. If audio-visual materials are to be utilized, a qualified and approved instructor must be present, during the audio-visual presentation, to answer questions on the subject matter presented.

The rule challenge

7. On November 18, 1994, petitioner filed a timely petition for an administrative determination of the invalidity of proposed rule 38F-53.011. Such protest did not contest the propriety of any provision of proposed rule 38F-53.011 regarding the procedures and criteria for the implementation or approval of the minimum five-hour training course required for physician certification except the provisions of subparagraph (7)(b) which, by implication, mandate a live seminar format and exclude video correspondence/home study as an acceptable training and certification program.

8. Notably, neither the petition nor proof offered at hearing contests the reasonableness of the rule's requirement that a "[s]yllabus and outline of course content including time frames for each component and schedules for any breaks or meals included in the presentation" be submitted to the Division, and that "[i]f audio-visual materials are to be utilized [at a seminar], a qualified and approved instructor must be present, during the audio-visual presentation, to answer questions on the subject matter presented." Rather, petitioner's complaint is that the rule does not go far enough in that it does not include, as an alternative to the live presentation contemplated by the rule, provision for audio visual home study. Such omission, viewed in conjunction with the provisions of section 440.13(3)(a) which mandate that the Division develop and implement the "5-hour course," but does not proscribe the mode by which such "course" will be delivered, is the essence of petitioner's contention that the proposed rule is invalid.

Standing

9. Petitioner, as a producer of educational videos for home or self-directed study, contends that it has standing to challenge the proposed rule because, as written, it will be precluded from producing and marketing a home study course for the physician certification program and, consequently, that it will fail to realize profits from the sale of videos that it might, if the rule allowed home study, otherwise garner. Respondent contests petitioner's standing to maintain this rule challenge proceeding.

10. Pertinent to the issue of standing, it is observed that the proof demonstrates that petitioner is a producer of educational videos for home study, and that it is not a health care provider or a representative of health care providers affected by Section 440.13(3), Florida Statutes (Supp. 1994), or the proposed rule, or otherwise shown to be regulated or controled under chapter 440 or the proposed rule.

11. As to the financial impact on petitioner, it "estimates" that as of the date of hearing it had spent "somewhere around $75,000 . . . in salaries, travel and other expenses associated with getting to where we are at this point" and that "if [it was] able to successfully sell [its] program to ten percent or less of the market that exists in Florida right now, that [it could double its existing annual sales of $650,000]." [Tr. pp. 25 and 26] Notably, while petitioner may have expended "around $75,000" in salaries, travel and other expenses associated with public hearings on the proposed rules and other efforts to persuade the Division to include video home study as an approved method for physicians to attain certification, and that it is doubtful petitioner would undertake such expense unless it anticipated that

production of such a program would insure to its benefit, the record is devoid of any competent proof to demonstrate, with any degree of certainty, what percentage of the market petitioner could reasonably be expected to garner or the net profit, it any, petitioner stands to loose if it is precluded from offering home study videos. In sum, the potential financial impact to petitioner in this case is not, based on the proof, quantifiable and is, at best, speculative.

The merits of the rule challenge

12. Based on the foregoing findings of fact and the conclusions of law which follow, it must be concluded that petitioner has failed to demonstrate its standing to maintain this rule challenge proceeding. Accordingly, since resolution of that issue is dispositive of this case, it is unnecessary to address the merits, if any, of petitioner's challenge.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 120.54(4), Florida Statutes.

14. Here, since respondent has placed petitioner's standing at issue, petitioner has the burden to demonstrate, as a prerequisite to its ability to challenge the validity of the subject rule, standing. Home Builders and Contractors Association of Brevard, Inc. v. Department of Community Affairs, 585 So.2d 965 (Fla. 1st DCA 1991). See, Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 881 (Fla. 1st DCA 1988) (A parties' standing is independent of their ability to prevail on the merits).

15. Pertinent to the issue of petitioner's standing to maintain this rule challenge proceeding, Section 120.54(4)(a), Florida Statutes, provides:

> Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority. (Emphasis added)

16. To demonstrate that it is substantially affected by a proposed rule, a party must establish that, as a consequence of the proposed rule, it will suffer injury-in-fact which is of sufficient immediacy to justify a hearing, and that the injury is of the type (within the zone of interest) to be regulated or protected. See, Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So.2d 186 (Fla. 1st DCA 1992), Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878 (Fla. 1st DCA 1988), Florida Medical Association, Inc. v. Department of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983), All Risk Corp. of Fla. v. Department of Labor and Employment Security, 413 So.3d 1200 (Fla. 1st DCA 1982), and Florida Department of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978).

17. The provisions of chapter 440, and more particularly section 440.13, are, inter alia, intended "to assure the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer." Section 440.015, Florida Statutes. There is no evident intent within chapter 440, and petitioner has advanced no other provision of law to evidence any intent, to regulate, control or benefit the interests of procedures of educational home study, such as petitioner, and that such entities might be incidental beneficiaries of legislation, such as enacted in the instant case requiring physicians to undertake a "5-hour course" of study, does not alter such conclusion. Moreover, the proposed rule does not purport to subject petitioner, or those similarly situated, to regulation or control, and the fact that the proposed rule does not include audiovisual home study as an acceptable training and certification program does not alter such conclusion. As observed by the court in Board of Optometry v. Florida Society of Ophthalmology, supra, at page 881, petitioner "cannot predicate standing on the notion that the application of the challenged rule will prevent or obstruct their practicing ophthalmic medicine" or, pertinent to this case, producing and selling audiovisual home study courses.

18. Given the speculative nature of petitioner's prospective injury and the lack of any nexus between petitioner's interests and any existent law intended to regulate or benefit petitioner or those similarly situated, it must be concluded that petitioner has failed to demonstrate that it is substantially affected by the proposed rule, and that it lacks standing to maintain this rule challenge proceeding. See, e.g., Florida Medical Association, Inc. v. Department of Professional Regulation, supra, and Florida Department of Offender Rehabilitation v. Jerry, supra.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that the subject petition to determine the invalidity of a proposed rule be and the same is hereby dismissed.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 20th day of February 1995.

WILLIAM J. KENDRICK
Hearing Officer
Division of Administrative Hearings
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of February 1995.

ENDNOTES

1/ The petition filed in the instant case facially challenged proposed rules 38F-53.001-53.011, but only included allegations directed to the provisions of proposed rule 38F-53.011. Specifically, petitioner contended that:

> The rule [contrary to Section 440.13(3)(a), Florida Statutes (Supp. 1994)], requires the presence of a 'qualified and approved instructor' anywhere a 'course' is conducted 'to answer questions on the subject matter' . . . This rule does not allow an alternative such as allowing students of a 'course' to contact a 'qualified and approved instructor' via telephone, computer, or mail to get answers to their questions. Due to this requirement, the rule, without statutory direction, prohibits any home study or correspondence 'courses' such as those produce (sic) by Petitioner from being certified as 'Worker's (sic) Compensation Training Courses'. [Petition, at paragraph 7b; emphasis in original.]

The petition further charged that such provision's failure to allow video correspondence/home study courses was arbitrary and capricious.

Notably, petitioner's prehearing stipulation also limits its challenge to proposed rule 38F-53.011, petitioner's opening statement was limited to proposed rule 38F-53.011, and the proof offered at hearing, as well as petitioner's proposed final order, was only directed to proposed rule 38F-53.011. Under such circumstances, it is concluded that by pleading, stipulation and proof, the sole rule at issue in this proceeding is proposed rule 38F-53.011, and that no other section of the proposed rule will be addressed in this final order since they are not under challenge.

2/ The court reporter has noted in the transcript of hearing that petitioner's exhibit 8 was received into evidence. [Tr. pages 5 and 73.] Such notation is erroneous, as the Hearing Officer sustained respondent's objection to that exhibit. [Tr. page 73.]

APPENDIX

Petitioner's proposed findings of fact are addressed as follows:

1 & 2. Addressed in paragraphs 1 and 9.
3-5. No necessary to address in light of the conclusion reached.
6-8. Addressed in paragraphs 3 and 4.
9-12. Not necessary to address in light of the conclusion reached.
13. Addressed in paragraphs 4 and 8.
14-21. Not necessary to address in light of the conclusion reached.
22 & 23. Addressed in paragraph 6.
24. Not necessary to address in light of the conclusion reached.
25. Addressed in paragraphs 6 and 7.
26-66. Not necessary to address in light of the conclusion reached.
67-70. Addressed in paragraphs 9-11, otherwise subordinate or contrary to the facts as found.

Respondent's proposed findings of fact are addressed as follows:

1. Addressed in paragraph 1.
2. Addressed in paragraph 2.
3. Addressed in paragraph 3.
4. Addressed in paragraph 4.
5. Addressed in paragraph 5.
6 & 7. Addressed in paragraph 6.
8-10. Not necessary to address in light of the result reached.
11. Addressed in paragraphs 9-11.
12-32. Not necessary to address in light of the result reached.
33. Addressed in paragraph 6.
34 & 35. Not necessary to address in light of the result reached.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules Of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk Of The Division Of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court Of Appeal, First District, or with the District Court Of Appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.